SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 658

ARMANDO SCHMERBER, PETITIONER,

vs.

CALIFORNIA.

ON WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., FEBRUARY 4, 1966

[fol. A]

IN THE
MUNICIPAL COURT OF LOS ANGELES
JUDICIAL DISTRICT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

No. 79883

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ARMANDO H. SCHMERBER, Defendant.

DOCKET ENTRIES

Nov 16 1964 $1100/S. Bond—U.S.F. & G.

Nov 18 1964 Complaint filed sworn to by John R. Kepke charging the Defendant with having on Nov 13 1964 at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit:

VIOL. of Sec. 23102 Vehicle Code—Ct. 1

VIOL. of Sec. 12951 Vehicle Code—Ct. 2

In the following case G. Fox, Reporter, is ordered to take down proceedings as provided by law.

Cause called. Judge Vincent N. Erickson presiding. Both parties ready. People represented by D. Reisner (D.C.A.). Defendant represented by Thomas McGurrin.

Defendant in court, duly arraigned, informed of the charge against him and of his legal rights. Defendant gives true name

as charged and enters his plea of not guilty of the offense charged.

Defendant with counsel in open court each personally demands jury trial. Trial set for Dec. 21, 1964, at 9:15 A.M. in Div. 70.

Bail up to stand.

Dec 15 1964 In this case Laura R. Pearl, Reporter, is ordered to take down proceedings as provided by law.

Div. 70 convened at 9:30 A.M. Cause called. Judge Donald M. Redwine presiding. Both parties ready. People represented by Alton A. Myhrvold (D.C.A.). Defendant not in court but represented by T. M. McGurrin. Edith Williams, Deputy Clerk.

Motion to advance granted. Deft's motion for continuance granted.

Cause continued for trial to Feb. 8, 1965, 9:15 A.M., Div. 70.

Defendant personally waives statutory time for trial. Bail up to Stand.

Jan. 27 1965 Notice of Motion and Motion to suppress evidence filed.

Jan 29 1965 Points and Authorities in Opposition of Defendant's Motion to Suppress evidence filed.

Feb 3 1965 In this case L. Sommers, Reporter, is ordered to take down proceedings as provided by law.

[fol. B]

Div. 70 convened at 1:15 P.M. Cause called. Judge David L. Mohr presiding. Both parties ready. People represented by Don Reisner (D.C.A.). Defendant in court and

represented by Thom. McGurrin. M. Carleton, Deputy Clerk.

Motion to advance granted. Deft's motion for Cont. granted.

Cause continued for trial to Apr. 7, 1965, 9:15 A.M.

Defendant personally waives statutory time for trial.

Bail up to stand.

Hearing on motion to suppress Cont. to 3-19-65—2 P.M., Div. 70.

Mar 9 1965 Declaration for Subpoena Duces Tecum filed —Issued to L.A. Co. Gen'l Hospital.

Affidavit for Subpoena Duces Tecum filed—Issued to Encino Hospital.

Mar 19 1965 In this case Lester M. Zive, Reporter, is ordered to take down proceedings as provided by law.

Div. 70 convened at 2 P.M. Cause called. Judge David L. Mohr presiding. Both parties ready. People represented by Donald J. Reisner (D.C.A.). Defendant not in court and not represented. M. Carleton, Deputy Clerk.

Atty. in Trial. Motion to suppress is continued to date of Trial, 4-7-65, 9 A.M., at which time motion will be heard and determined by Trial Court.

Apr 7 1965 In this case Louis Sommers, Reporter, is ordered to take down proceedings as provided by law.

Div. 70 convened at 9 A.M. Cause called. Judge David L. Mohr presiding. Both par-

ties ready. People represented by Alton A. Myhrvold (D.C.A.). Defendant in court and represented by T. McGurrin. M. Carleton, Deputy Clerk.

Cause transferred to Div. 35—Rm. 836, L.A. County Courthouse, 110 No. Grand Ave., trans. order #2475.

Cause continued for trial to Apr. 26, 1965, 8:30 A.M.

Defendant personally waives statutory time for trial.

Bail up to stand.

[fol. C]

Apr. 13 1965 Declarations for subpoena duces tecum filed.

Apr 26 1965 Division 35. Judge Jospeh P. Kelly, Jr., Presiding. Case No. 79883. People vs. Armando Schmerber. Cause called. Both parties ready. People represented by Irvin L. Sepkowitz (D.C.A.). Defendant in court and represented by T. McGurrin. Shirley Estes, Clerk.

Transferred to Div. 12 for trial.

Apr 26 1965 In this case William A. Weigel, Reporter, is ordered to take down proceedings as provided by law.

Div. 12 convened at 11:20 A.M. Cause called. Judge George M. Dell presiding. Both parties ready. People represented by Kim H. Pearman (D.C.A.). Defendant in court and represented by Tom McGurrin. J. Weatherwax, Deputy Clerk.

Defendant admits prior conviction.

Motion of Counsel for the Defendant to suppress blood sample, analysis of blood sample and oral testimony re: blood sample.

Motion denied.

Stipulated by and between counsel that at the time of the taking of the blood sample there was no warrant of arrest for the Defendant.

Recess to 1:30 P.M.

At 1:45 P.M. cause called. Stipulated that all parties are present as before.

The following Jurors were sworn, examined and accepted:

1. Lewis, Laura Charlotte Mrs.
2. Baruff, Leora W. Mrs.
3. Alexander, Edward J.
4. Langdon, Clarence L.
5. Fishburn, Cody C.
6. Foss, Albert F.
7. Morgan, Vivian M. Mrs.
8. Maisterra, Josephine P. Miss
9. Roche, Kathleen Miss
10. McFarland, June L. Mrs.
11. Thomas, Daisy M. Mrs.
12. Foss, Albert F.

Jury sworn to try cause.

Count II dismissed.

Motion of Defendant to exclude witnesses granted.

[fol. D]

The following witnesses were sworn and examined for People:

Lowell L. Eaker

Recess to 3:30 P.M. Jury admonished.

At 3:36 P.M. cause called. Stipulated that jury and all parties are present as before.

Bruce E. Davidson

Recess to 9:15 A.M. on Apr. 27 1965. Jury admonished. Witnesses instructed to return.

Bail up to stand.

Apr 27 1965 In this case William A. Weigel, Reporter, is ordered to take down proceedings as provided by law.

Div. 12 convened at 9:28 A.M. Cause called. Judge George M. Dell presiding. Both parties ready. People represented by Kim H. Pearman (D.C.A.). Defendant in court and represented by Tom McGurrin. J. Weatherwax, Deputy Clerk.

At 9:28 A.M. cause called. Stipulated that jury and all parties are present as before.

The following witnesses were sworn and examined for People:

John T. Schillo
William Ranlett
Edward A. Slattery

People's Exhibits filed:

1 (Property Transfer Record
2 (Property Transfer Record

Jury excused at this 9:50 A.M. Jury admonished.

Out of the hearing of the Jury Motion of Defendant to exclude certain evidence denied.

Recess to 11:00 A.M.

At 11:05 A.M. cause called. Stipulated that jury and all parties are present as before. Edward A. Slattery resumes stand.

[fol. E]

Stipulated by and between counsel that a blood sample was taken from the Defendant by a Dr. Brooks according to standard procedures at the Encino Hospital.

Thomas E. Buell

Defendant's Exhibits filed for Identification only:

A (1 photograph)
B (1 photograph)
C (1 photograph)
D (1 photograph)
E (1 photograph)

Recess to 2:00 P.M. Jury admonished.

At 2:22 P.M. cause called. Stipulated that jury and all parties are present as before.

The following witnesses were sworn and examined for People:

Geraldine Lambert

People's Exhibits filed:

3. (1 Manila envelope containing vial containing blood sample and analysis)
4. (Diagram)

People Rest.

Recess to 3:25 P.M.

At 3:31 P.M. Cause called. Stipulated that jury and all parties are present as before.

Defendant's exhibits:

F (Copy of Encino Receiving Hospital record)

G (Rescue report #A61595)

H (Canoga Park Hospital records)

I (Records of Los Angeles County General Hospital)

J (Hospital records of Canoga Park Hospital)

Defendant's Exhibits A through E for identification admitted into evidence.

[fol. F]

The following witnesses were sworn and examined for Defendant:

Armando Schmerber

People's Exhibit for identification:

5 (Blood Alcohol Chart)

Defendant rests.

Recess to 9:15 A.M. of Apr 28 1965.

Jury admonished.

Bail up to stand.

Apr 28 1965 In this case William A. Weigel, Reporter, is ordered to take down proceedings as provided by law.

Div. 12 convened at 9:15 A.M. Cause called. Judge George M. Dell presiding. Both parties ready. People represented by Kim H. Pearman (D.C.A.). Defendant in court and represented by Tom McGurrin. J. Weatherwax, Deputy Clerk.

At 9:15 A.M. cause called. Stipulated that jury and all parties are present as before.

Cause argued.

Recess to 10:45 A.M.

At 10:53 A.M. cause called. Stipulated that jury and all parties are present as before.

Jury instructed, instructions filed.

Jury retired this Apr 28 1965 at 11:15 A.M. in charge of Bailiff H. A. Hennes, Jr., duly sworn,* at this 2:30 P.M. jury return into court with the following verdict:

"We, the jury in the above entitled cause, find the defendant guilty of the offense charged.

A. F. Foss, Foreman."

Verdict Filed.

[fol. G]

Defendant waives time of sentence.

Cause continued for sentence to May 20, 1965, 1:30 P.M.

Bail up to stand.

May 20 1965 Division 12. Judge George M. Dell Presiding. Case No. 79883. People vs. Armando H. Schmerber. Cause called. Both parties ready. People represented by John B. Rice

* (At this 12:00 P.M. jury taken to lunch in charge of Bailiff H. A. Hennes, Jr. At this 1:30 P.M. jury returned into Jury room for further deliberation.)

(D.C.A.), Defendant in court and represented by T. McGurrin.

J. Weatherwax, Clerk.

In this case Norman Tulin, Reporter, is ordered to take down proceedings as provided by law.

Defendant in court and having been duly arraigned for judgment, and there being no legal cause why judgment should not be pronounced.

"It is adjudged and ordered by the Court that, as a punishment for the crime of violation of 23102 V.C. the Defendant shall be imprisoned in the County Jail of the County of Los Angeles for the term of 90 days, and that said defendant shall be discharged from imprisonment upon the expiration of said term."

It is further ordered, that the execution of sentence be suspended and that the defendant be placed on summary probation for 3 years subject to the following terms of probation:

1—Be confined for the first 30 days in the County Jail.

2—Pay a fine in the sum of $250.00 plus a $26.00 penalty assessment or be confined 25 days in the County Jail.

3—Obey all laws.

4—Not to drive without a valid California Operator's license.

5—Not to violate V.C. 23102 or related laws.

Stay of execution granted to May 26, 1965 at 3:00 P.M.

Bail ordered exonerated.

Notice of Appeal filed.

[fol. H]

Bond on Appeal set at $250.00 plus $26.00 penalty assessment.

Bail to be posted on or before May 26, 1965, at 3:00 P.M.

May 24 1965 Appeal Bond filed—$276—U.S.F. & G.

May 25 1965 Proposed Statement on Appeal filed.

Jun 3 1965 Reporter's transcript Volume I & II filed.

Jun 4 1965 Hearing to settle Statement on Appeal and reporter's transcripts set for June 11, 1965 at 2 P.M. in Division 12.

Notice mailed. Affidavit of service by mail filed.

Jun 11 1965 Division 12. Judge George M. Dell Presiding. Case No. 79883. People vs. Armando H. Schmerber. Cause called. Both parties ready. People represented by Gary R. Netzer (D.C.A.). Defendant in Court and represented by Tom McGurrin.

J. Weatherwax, Clerk.

The Court does now settle and allow the Statement on Appeal and Reporter's Transcript and certifies that the same is a true and correct statement of the proceedings had in the above entitled action.

I hereby certify that the above and foregoing is a full, true and correct copy and transcript of the docket in the within named cause.

June 15, 1965

George J. Barbour, Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

By Evelyn E. Miller, Deputy

[fol. I]

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

No. 04719

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ARMANDO HOYAS SCHMERBER, Defendant.

COMPLAINT—Filed November 18, 1964

Personally appeared before me, the undersigned, who, first being duly sworn, complains and says: That on or about November 13, 1964, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: Violation of Section 23102 of the Vehicle Code of the State of California was committed by Armando Hoyas Schmerber (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully drive a vehicle upon a highway, to-wit: Mecca Avenue, while he was under the influence of intoxicating liquor.

That the defendant before the commission of the offense charged herein, to-wit: on or about the 23rd day of Feb-

ruary 1962, was convicted of having violated the provisions of Section 23102 of the Vehicle Code of the State of California. All of which is contrary to the law in such cases made and provided, and against the peace and dignity of the People of the State of California. Said Complainant therefore prays that a warrant may be issued for the arrest of said Defendant ..... that ..... he ..... may be dealt with according to law.

Subscribed and sworn to before me on Nov. 1 1964. John R. Taplo.

George J. Barbour, Clerk of the Municipal Court of Los Angeles Judicial District, in said County and State.

By Beverly Walker, Deputy Clerk.

[fol. J] Count II

For a further, separate and second cause of action, being a different offense belonging to the same class of crimes and offenses set forth in Count I hereof, affiant complains and says: That on or about the 13th day of November 1964, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to wit: Violation of Section 12951 of the Vehicle Code of the State of California was committed by Armando Hoyas Schmerber (whose true name to affiant is unknown), who at the time and place last aforesaid, was a licensee holding a license issued by the Department of Motor Vehicles of the State of California authorizing him to drive a motor vehicle upon the highways of this State, who did wilfully and unlawfully fail, refuse and neglect to have such license in his immediate possession when driving a motor vehicle upon a highway, and to display the same upon demand of a peace and traffic officer then and there enforcing the provisions of the Vehicle Code of the State of California.

(See opposite) ☞

Entered Nov 18, 1964 L.A. 30 Nov 17 568

[fol. K]

No. 79883

MUNICIPAL COURT PROCEEDINGS

Date

11/16/64 1100 Dept 1 - 915 FTB

NOV 18 19[illegible] Defendant in Court duly arraigned, informed of the charge against him and of his legal rights. Defendant gives true name as charged

and enters his plea of ..... guilty of the offense charged.

Denies—Admits—prior conviction ..... charged.

Bail fixed at $ ..... Dollars

Not Guilty Plea
Waived: X
X
Trial Date: Dec 21 1964 cdj

Div. 70: X 9:15 A.M.
1:15 P.M.

Bail set: ~~cp~~ OR Ind

OR Feb 21 - 1965 cdj

Dept. 70 for conten of Ind Counsel Engaged to Appear April 7 9:15 FTB

DIV. 70

Hearing on Mo. to Suppress Contnd to 3-19-65 2pm Hoyt

Bail ~~as~~ to stand

IN THE

MUNICIPAL COURT

of

Los Angeles Judicial District,
County of Los Angeles, State of California

The People of the State of California.
PLAINTIFF,

vs.

ALFONSO HOYAS SCHREIBER

19750 Aldabery Street

Saugus, California

DEFENDANT.

COMPLAINT

Filed NOV 18 1964, 19

GEORGE J. BARBOUR,
Clerk of the Municipal Court
of the Los Angeles Judicial District,
County of Los Angeles, State of California.

By Lucille Walker
Deputy Clerk.

Issued by
ROGER ARNEBERGH
City Attorney

By Harold Wennerd
Deputy City Attorney.

WITNESSES:

~~DEFT~~ 79

DEFT

MAR 19 1965 - Atty is in trial

DEFT

& Mot. to Suppress is contnd to date of trial

Apr 7, 1965 9:15 A.

at which time said Mo. will be heard & determined by the Trial Court

No. 79883 People vs Leonard W Schuman

ADDITIONAL MUNICIPAL COURT PROCEEDINGS

[fol. L]

DATE	
	ATTORNEY T. H. McGuckin
5-24-65	#276 Co Surety Bond on Appeal posted (Chester Fidelity)
JUN 11 1965	GEORGE M. DELL
	The Court does now settle and allow the statement on Appeal and Reporters Transcript and certifies that the same is a true and correct statement of the proceeding had in this action.
SEP 8 1965	Joseph P. Kelly, Jr.- Atty for Mc Murrin Sent to Judge Wall for Stay of Execution ffk
SEP 8 - 1965	AFTER FILING STAY GRANTED TO NOV 29, 1965, 1 3rd PM TO BE - (NOV 12)

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No. 79883 People vs Armando H. Schinerber

ADDITIONAL MUNICIPAL COURT PROCEEDINGS

DATE	ATTORNEY Tom McGuire
APR 27 1965	GEORGE M. DELL
	Cont to 4-28-65 9:45 A.M. D.T.S.
APR 28 1965	GEORGE M. DELL
	FOUND GUILTY & CONT'D FOR SENT TO 5/20/65 1:30 PM — T/U - BTS (JURY POLLED ON CT'S MOTION) Defendant waives time of sentence Bail up to stand
5/20/65	T-BTS Susp. Summary probation 2 yr(s) on condition: 1. 30 days 2. PAY $25 3. Obey all laws 4. Not drive w/o valid Calif. Op. Lic. 5. Not violate V.C. 23102 or related laws 6.
BAIL ORDERED EXONERATED	STAY TO 5/20/65 - 3 PM APPEAL BOND TO BE SET @ $250.00

[fol. M]

17

No. 79883 People vs Carmichael Schmerber

ADDITIONAL MUNICIPAL COURT PROCEEDINGS

DATE ATTORNEY T. McMahon

APR 7 1965 70

DAVID L. MOHR D ready - 2-3 days.

D Ready - 3-4 days.

Transferred to Div 35 - Rm 536

County Courthouse

110 N. Grand Ave.

Transfer Order # 2475

Cont'd to 4-26-65 8:30 AM

APR 26 1965 Joseph P. Kelly, Jr. T/W.

~~Div 12~~ Div 12 Call up to dept

APR 26 1965 GEORGE M. DELL

D MOTION TO SUPPRESS EVIDENCE DENIED

DEFT ADMITS PRIOR & COUNT II DISMD

ON C/A MOTION (~~D~~ IN ABSENCE OF DWay)

[fol. N]

[fol. O]

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

No. 04719

[Title omitted]

NOTICE OF MOTION AND MOTION TO SUPPRESS EVIDENCE—
Filed January 27, 1965

To: The People of the State of California, Officer F. A. Slattery #4652, Sgt. J. A. Smith, T. E. Buell, Officer J. R. Kepke, John Doe, Geraldine Lambert, William Parker, Chief of Police and Their Attorney, Roger Arnebergh:

Please Take Notice that on February 3, 1965, at 1:30 P.M. in Division 70 of the above entitled Court, Defendant Armando H. Schmerber, will move for a hearing and for an order for the return and suppression of evidence as follows:

(1) Return of blood sample taken from Armando H. Schmerber on November 14, 1964 at the Encino Hospital by Dr. W. Brooks at the order of the Los Angeles Police Department and the above named individuals.

(2) Suppression of the records of any and all analysis of the blood sample of Armando Schmerber taken on November 14, 1964 by Encino Hospital at the request of Los Angeles Police Department and the above named individuals.

[fol. P] (3) Suppression of any oral evidence of the results of the said tests on the blood of Armando Schmerber.

(4) Suppression of any evidence of the fact that a blood test was offered and/or accepted, and/or refused and taken with relation to Armando Schmerber.

Said Motion will be based on the Declaration and Points and Authorities attached hereto and on all the records in the case.

Thomas M. McGurrin, Attorney for Defendant.

[File endorsement omitted]

[fol. Q]

ATTACHMENTS TO NOTICE OF MOTION, ETC.

State of California,
County of Los Angeles, ss.:

I, Armando H. Schmerber, say:

I am the Defendant in the case of People v. Armando H. Schmerber.

On November 14, 1964, I was taken by ambulance to the Encino Hospital about 12:30 A.M. I was requested to submit to extraction of blood at the hospital at approximately 2:00 A.M. on November 14, 1964. I refused to allow the extraction of blood. Over my objection and at the order of one or more Los Angeles police officers, I believe Sgt. J. A. Smith and E. A. Slattery, my blood was taken from me against my will by a Dr. W. Brooks. I refused said taking of my blood because my attorney had advised me to refuse such a test, and because of my privilege against self-incrimination contained in the California Constitution and the Fifth and Fourteenth Amendments to the Federal Constitution.

At the time of taking of the blood I had one broken rib, a fractured right leg and lacerations on my forehead and nose. At this time I was in severe pain and any movement by myself caused me great pain. As a consequence of the pain I could not and did not physically resist the taking of my blood.

I was arrested on November 14, 1964 by Los Angeles police officers some time after the taking of my blood for an alleged violation of Vehicle Code 23101.

I desire the return of my blood sample, all records of the result of any analysis of my blood sample, and suppression of any oral evidence of the results of said blood tests.

I declare under penalty of perjury the foregoing is true and correct.

Executed on 1-26-1965 at 19750 Oldbury St., Saugus, Calif.

Armando H. Schmerber.

[fol. R] POINTS AND AUTHORITIES

I.

The Trial Court has authority to hear, consider and grant a motion for suppression and return of evidence illegally obtained.

The Municipal Court besides having statutory authority to suppress evidence illegally or improperly obtained under a search warrant has the inherent authority to do the same thing in a situation where no search warrant existed.

People v. *Justice Court*, 185 C.A. 256;

Gershenhorn v. *Superior Court*, 227 A.C.A. 385;

Gershenhorn v. *Superior Court*, 225 A.C.A. 156.

II.

Taking Blood Against a Person's Will Is a Violation of the Privilege Against Self-Incrimination Contained in the State Constitution Article 1 § 13 and the Fifth and Fourteenth Amendment of the Federal Constitution.

In the past decade the law has undergone a momentous change in the field of constitutional law relating to due process and the privilege against self-incrimination. Defendant contends this change of interpretation and philos-

ophy requires the suppression of the evidence relating to the blood sample in this case.

The Supreme Court of California in 1957 rendered its decision in the case of *People* v. *Duroncelay*, 48 C.2 766, holding that the results of a blood test obtained against a defendant's will is admissible. The facts of the case simply indicated that a defendant who was lawfully under arrest attempted to withdraw his arm when an attempt was made to extract his blood. The blood was taken nevertheless.

The Court in discussing the admissibility of the evidence held that since he was under arrest his person could be searched and this was a lawful search. The Court peremp- [fol. S] torily held that based on its previous decision in *People* v. *Haeussler* (1953) 41 C.2 252, that since there was no testimonial compulsion there was no violation of the privilege against self-incrimination. Justice Carter wrote a vigorous dissent in both the *Duroncelay* and *Haeussler* cases wherein he stated that extraction of blood constituted a deprivation of due process and an unreasonable search and seizure. His observation was that there is an immense difference between searching a man's car or person and extracting from his body a fluid, whether it be blood, urine or spinal fluid.

Since the decisions in these two cases the United States Supreme Court has decided a number of cases which defendants submit requires the reversal of the *Duroncelay* and *Haeussler* cases.

In *Malloy* v. *Hogan*, —— U.S. ——, 12 L.Ed.2 653, 85 S.Ct. ——, the Court held that the privilege against self-incrimination in the Fifth Amendment was applicable to the States by reason of the Fourteenth Amendment.

This conclusion of course, completely changes the application of the past Supreme Court cases which held that the Fifth Amendment was not applicable to the States under the Fourteenth Amendment.

In *Breithaupt* v. *Abram*, 352 U.S. 432, the Supreme Court in a 6 to 3 decision held that taking blood from an uncon-

scious person was not such conduct as to constitute a violation of due process under the Fourteenth Amendment. The Court also said that the Fifth Amendment to the Constitution did not apply to the States. This rule of course, has been changed by *Malloy*, supra. The Court further stated that the Fourth Amendment was not applicable to the States under the Fourteenth Amendment. This rule has also been changed by *Mapp* v. *Ohio*, 367 U.S. 643 and *Ker* v. *California*, 374 U.S. 23.

It can therefore be seen that the fundamental basis for the decision in the *Breithaupt* case has been reversed. [fol. T] Additionally, it should be noted that the now Chief Justice Warren and Associate Justices Black and Douglas wrote vehement dissents to the majority opinion. Chief Warren stated, among other things:

"In reaching its conclusion that in this case, unlike *Rochin*, there is nothing 'brutal' or 'offensive' the Court has not kept separate the component parts of the problem. Essentially there are two: the character of the invasion of the body and the expression of the victim's will; the latter may be manifested by physical resistance. Of course, one may consent to having his blood extracted or his stomach pumped and thereby waive any due process objection. In that limited sense the expression of the will is significant. But where there is no affirmative consent, I cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest. The Court, however, states that 'the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right.' This implies that a different result might follow if petitioner had been conscious and had voiced his objection. I reject the distinction.

"Since there clearly was no consent to the blood test, it is the nature of the invasion of the body that should be determinative of the due process question here presented.

The Court's opinion suggests that an invasion is 'brutal' or 'offensive' only if the police use force to overcome a suspect's resistance. By its recital of the facts in *Rochin*—the references to a 'considerable struggle' and the fact that the stomach pump was 'forcibly used'—the Court find *Rochin* distinguishable from this case. I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights. [fol. U] "Apart from the irrelevant factor of physical resistance, the techniques used in this case and in *Rochin* are comparable. In each the operation was performed by a doctor in a hospital. In each there was an extraction of body fluids. Neither operation normally causes any lasting ill effects. The Court denominates a blood test as a scientific method for detecting crime and cites the frequency of such tests in our everyday life. The stomach pump too is a common and accepted way of making tests and relieving distress. But it does not follow from the fact that a technique is a product of science or is in common, consensual use for other purposes that it can be used to extract evidence from a criminal defendant without his consent. Would the taking of spinal fluid from an unconscious person be condoned because such tests are commonly made and might be used as a scientific aid to law enforcement?

"Only personal reaction to the stomach pump and the blood test can distinguish them. To base the restriction which the Due Process Clause imposes on state criminal procedures upon such reactions is to build on shifting sands. We should, in my opinion, hold that due process means at least that law-enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth."

From this it seems clear that *Breithaupt, Duroncelay* and *Haeussler* are no longer the law and that extraction of blood against the will of any person is a violation of the privilege against self-incrimination.

[fol. V]

III.

Taking Blood Against a Person's Will Is a Violation of Due Process Under the Fourteenth Amendment in That It Constitutes an Involuntary Admission and Is Inadmissible.

It is accepted as fundamental that forcing a person to make oral utterances which are admissions or confessions of guilt is violative of the due process clauses of the Fourteenth and Fifth Amendment.

Brown v. *Mississippi* (1935), 297 U.S. 278.

Prolonged questioning to obtain a confession has been held to be violative of due process without any violence or threat.

Ashcroft v. *Tennessee*, 322 U.S. 143.

Under Federal law not specifically made applicable to the States by any decision, as yet, but which will be forthcoming soon, a confession obtained during a period of illegal detention is inadmissible.

McNabb v. *U.S.*, 318 U.S. 332;
Mallory v. *U.S.*, 354 U.S. 449.

It seems entirely fallacious to say that forcing or inducing a person to give a confession against his will is inadmissible as a violation of due process and then to turn around and make a fictitious and specious distinction and say that blood taken out of a person and against his will and then used against him to establish his intoxication is not violative of due process. The Courts continually cite the value and efficacy of the blood alcohol test as they did in the *Breithaupt* case, Supra, which certainly shows that it is as persuasive, or more persuasive than a confession or admission.

It seems unreasonable to say that if you place a man on the rack and squeeze an oral utterance from his lips, this is violative of due process, but if you squeezed the blood out of him this would not be oral and therefore, not [fol. W] a confession and therefore not violative of due process. The argument that under such circumstances the blood may be inadmissible under the *Rochin* case (342 U.S. 165) shows the error fallacy of this unrealistic distinction.

An intrusion into the person's body to obtain evidence against him is certainly as objectionable and as violative of due process as forcing or requiring a person to orally confess.

To follow the argument that body fluids can be taken from a person against his will we then must conclude that no complaint can be made of the following:

(1) a spinal tap to obtain spinal fluid

(2) the insertion of a catheter to obtain a urine sample.

Why do we try to draw such tenuous distinctions to obtain and uphold convictions and violations of people's rights when the Constitution clearly states that the right of the People to be secure in *their persons* against unreasonable searches and seizures shall not be violated?

IV.

Taking of Blood Against a Person's Will Is a Violation of the Due Process Clause of the Fourteenth Amendment.

The taking of blood against a person's will is a violation of the prohibition against unreasonable search and seizure contained in the State Constitution Article I § 19 and the Fourth and Fourteenth Amendment to the Federal Constitution.

In addition to the vigorous dissents in the *Breithaupt* case, Supra, the California Courts in two more recent deci-

sions have tacitly held that taking blood without consent makes such evidence inadmissible.

People v. *Knox*, 178 C.A.2 502, 515;

People v. *Cavallero*, 178 C.A.2 5.

[fol. X] Conclusion

From the facts it seems clear that not only did the police and the doctor commit a battery on defendant by their conduct, but they violated his Constitutional rights and the evidence so obtained is inadmissible.

This Court should therefore, make its order suppressing the use of the blood and ordering its return to defendant.

Respectfully submitted,

Thomas M. McGurrin, Attorney for Defendant.

[fol. 1]

IN THE
MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Hon. George M. Dell, Judge—Division No. 12

No. 79883

Ct. I Viol. of Sec. 23102 V. C., Ct. II Viol. of Sec. 12951 V. C.
Misdemeanors

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ARMANDO HOYAS SCHMERBER, Defendant.

Reporter's Transcript of Proceedings—Monday, April 26, 1965; Tuesday, April 27, 1965; Wednesday, April 28, 1965

APPEARANCES:

For the People: Kim H. Pearman, Esq., Deputy City Attorney.

For the Defendant: Thomas M. McGurrin, Esq., 315 South Beverly Drive, Beverly Hills, California 90212, CRestview 6-2755.

[fol. 2]

Los Angeles, California, Monday, April 26, 1965

11:15 A. M.

The Court: This is People versus Armando Hoyas Schmerber, Mr. McGurrin as counsel.

Mr. McGurrin: Yes.

The Court: The defendant and his counsel are ready at this time. I understand there is a motion first.

Mr. McGurrin: Yes, your Honor. That is correct.

I don't think the People have had an opportunity really to cover all the facts of the motion yet.

The Court: I think I have both the Court's copy and the additional copy, which the People can have.

Mr. Pearman: I have a copy, your Honor.

The Court: Then the People are ready at this time?

Mr. Pearman: I have read his motion, is all.

The Court: I have read the cases cited therein.

Is there any further argument?

Mr. McGurrin: I'd like to take testimony.

The Court: Go right ahead.

Mr. McGurrin: For the purpose of keeping the record clear, at this time I would move to suppress the blood [fol. 3] sample taken from Armando H. Schmerber on November 14, 1964, at the Encino Hospital by Dr. W. Brooks.

I further move to suppress any records of any analysis of the blood sample of Armando Schmerber taken on November 14, 1964 as before indicated.

I also move to suppress any oral evidence of the results of the blood test taken of Armando Schmerber and also move to suppress any evidence of the fact that a blood test was offered and/or accepted and/or refused and taken with relation to Armando Schmerber.

The objection and motion to suppress is based on the fact that the blood test was obtained in violation of the defendant's constitutional rights under the Fourth, the Fifth, and the Fourteenth Amendment to the United States Constitution in that it constitutes a violation of the defendant's right against illegal search and seizure under the Fourth and the Fourteenth. It constitutes a violation of the privilege against self-incrimination pertaining to the Fifth and the Fourteenth and constitutes a violation of due process in general by reason of the matter in which the blood was taken.

I don't know what the procedure would be, whether or not the People want to call a witness in rebuttal of the affidavit or whether or not I would put the defendant on the witness stand for the purpose of establishing the facts.

[fol. 4] The Court: Is he going to testify to anything differently other than what he has indicated in the affidavit?

Mr. McGurrin: No.

The Court: Do the People controvert what is in the defendant's affidavit?

Mr. Pearman: No, your Honor.

The Court: Very well.

Then it is simply a question of law, based on the statements in the affidavit.

I certainly don't know what the Appellate Court is likely to do on this point today, but I think I am bound by the prior decisions.

Mr. McGurrin: May I just ask one question, your Honor?

The Court: Yes, indeed you may.

Mr. McGurrin: The People have indicated they do not controvert the allegations of the affidavit.

The Court: For the purpose of this motion I assume that is their statement.

Mr. McGurrin: If this defendant is convicted, I want to take this case on appeal—it is an important case—to take up as far as it will go.

The Court: I assume that is your desire, and it certainly is your right. I assume you are making a record.

[fol. 5] Mr. McGurrin: Yes. That is correct. That is why I want to make sure there is nothing in this affidavit of controversy for the purposes of the motion, and I want to make sure they do not controvert anything contained therein.

The Court: That is what the Court asked and the City Attorney has indicated. I would suggest you review it and be sure that is your position, Mr. Pearman.

I also make one more suggestion, because if, A, there is a conviction, and if, B, the matter is taken up, I think it would certainly be in the interest of justice that there be

a clear decision on the point, not based on any technicality. For that reason I have one suggestion to make. It's a very minor one.

The Deputy City Attorney didn't sign the original Points and Authorities. I don't know that that is particularly material. I suggest Mr. Pearman might want to sign it in his behalf, so at least it will be complete on the face of it.

Mr. McGurrin: Fine, your Honor.

The Court: This Court has only recently had the necessity of checking the cases on this particular point. I am just not going to express any opinion as to what I think an Appellate Court might or might not do. I will simply say that, based on the rules that presently I am bound by, I believe the evidence to be admissible. So I think you [fol. 6] have your record, I think just as clear as you want it.

Mr. McGurrin: I think we might stipulate at the time of the extraction of the blood sample there was no warrant for the arrest of the defendant Armando Schmerber.

The Court: Let me just check the affidavit first before I receive any stipulation.

I am sure there was no such warrant. Is that stipulated?

Mr. Pearman: Yes. I will so stipulate.

The Court: Here is my suggestion. I will rule on the motion as it's been presented. I presume you are ready to proceed with the impanelment of a jury and the commencement of the trial of the action.

At some appropriate point I will suggest that perhaps counsel would like to make an objection out of the hearing of the jury if he desires, and perhaps even after that an appropriate motion, which I will rule on. I have indicated I will deny the motion. I think perhaps since you want to preserve the matter for Appellate review in the event there is a conviction, that you will want to make your objection later on with the appropriate motion.

Mr. McGurrin: Thank you very much, your Honor.

The Court: I will do that. We will see that that is [fol. 7] handled as a matter of law and does not unduly confuse the jury.

So far as the People are concerned, they are willing to stand on the record that they have, which is simply the defendant's affidavit with the stipulation that there was no warrant.

Mr. Pearman: Yes, your Honor.

The Court: That is satisfactory to the defense also?

Mr. McGurrin: Yes.

The Court: For reasons I have indicated before, I deny the motion to suppress.

Are there any preliminary motions?

Mr. McGurrin: No.

The Court: Do you want to start the impanelment of the jury at 1:30? I have no feeling about it one way or another.

Mr. McGurrin: Yes.

The Court: By the time we get a jury down, it will be 20 minutes of 12:00. We are obviously not going to complete it by noon, so I will make the request that the jury panel will be down here at 1:30 and we will commence promptly at that time.

Mr. McGurrin: Thank you, your Honor.

(Whereupon, at 11:35 o'clock A. M. an adjournment was taken until 1:30 o'clock P. M.)

[fol. 8]

Los Angeles, California, Monday, April 26, 1965

1:50 P. M.

The Court: People versus Armando Hoyas Schmerber.

Mr. McGurrin: Yes. Ready for the defendant.

The Court: The record will indicate the defendant is present.

Are the People ready?

Mr. Pearman: The People are ready.

The Court: Very well.

Will the clerk swear the prospective jurors, please?

(Whereupon, a jury of 12 was duly impaneled and sworn.)

(Discussion at the bench between the Court and counsel, as follows:

The Court: For the record I wanted to confirm the two items which we discussed in chambers. I understand, first, out of the hearing of the jury, the defendant admits the prior?

Mr. McGurrin: In 1962.

The Court: February 23rd.

Mr. McGurrin: That is correct, your Honor.

The Court: I understand, secondly, that the People move to dismiss Count number II, charging a violation of Section [fol. 9] 12951 of the Vehicle Code?

Mr. Pearman: That is right.

The Court: That motion is granted. I assume there will be an opening statement by you.

Mr. McGurrin: No. I waive opening.

The Court: That is my slip. I am used to thinking of you as a City Attorney.

Mr. Pearman: I will make an opening statement.

The Court: I will make a statement to that effect.

Mr. McGurrin: I just would like at this time to make a motion for the exclusion of witnesses in this matter.

The Court: I will grant the motion. Who is your first witness going to be?

Mr. Pearman: I will call Mr. Eaker, a civilian witness.

The Court: You are entitled to have the investigating officer present.

Mr. Pearman: Yes. Officer Slattery.

The Court: I will grant the motion, and I will simply make the observation without indicating who is making the motion for the exclusion of witnesses.

(End of discussion at the bench.)

The Court: The Court is going to grant a motion which [fol. 10] has been made at the bench to exclude witnesses. I think we might as well do that now, even before the opening statement has been made. So, other than the People's first witness, Mr. Eaker, and the investigating officer, Mr.

Slattery, the other witnesses in this cause will please be good enough to step outside. They will called when their testimony is needed. There is no objection to eliminating them from the courtroom before the opening statement, is there?

Mr. McGurrin: No, your Honor.

Mr. Pearman: No, your Honor.

The Court: Very well. All right.

Any other witnesses other than those two persons, if there are any persons who are here simply as members of the public or who are not witnesses, they, of course, may remain.

At this time we will have the opening statement by the People, and I understand that counsel for the defendant, who has a right to make an opening statement, will reserve that statement until the People have rested. If he is going to make one, he will make one at that time.

We will hear the People's statement now.

* * * * * * *

[fol. 16] Lowell Eaker was called as a witness by and on behalf of the People, and having first been duly sworn, was examined and testified as follows:

The Clerk: State your name, sir.

The Witness: Lowell Eaker. L-o-w-e-l-l E-a-k-e-r.

Direct examination.

By Mr. Pearman:

Q. Mr. Eaker, what is your occupation?

A. Mason contractor.

Q. Where was your address on November 14, 1964?

A. 7307 Woodman Avenue, apartment three.

Q. Now, on November 14, 1964, at approximately 10:00 o'clock P. M. were you in the A J Tavern in the San Fernando Valley?

A. No, sir. It was November 13th at that particular time.

Q. Pardon me. November 13th?

A. Yes, sir.

Q. Where approximately is the A J Tavern located?

A. It's on Ventura Boulevard in Tarzana, near Reseda Boulevard.

Q. On this particular evening did you see the defendant, seated on my extreme left?

[fol. 17] A. Yes, sir.

Q. Now, would you please relate to the Court and to the jury what you observed and what you did with the defendant from the time that you walked into the A J Tavern until the time that you left?

A. I walked in. He and his brother were shooting a game of pool. I went in with a friend for the same purpose, to shoot a game of pool and have a couple of beers. He and I had one game of pool, and we had two beers together. Then he was telling me about his brother's new car. On White Oak Street at that time, at that particular time, there was some apartment buildings going up. Due to the fact that I am a mason contractor and he is in the roofing business, that was our purpose for going down that way, to see how far along the apartments were.

Q. Before we get to the automobile, when you were in the A J Tavern, approximately how long were you there with the defendant?

A. Maybe an hour.

Q. Was the defendant there when you came in?

A. Yes, sir.

Q. When you left after you did leave the A J Tavern, where did you go at this time? What was your reason in leaving?

A. The reason was for going to check the apartments, and he was going to show me his new car.

[fol. 18] Q. What kind of a car was it?

A. It was a real late model Pontiac, but I don't know what model.

Q. Are you very well acquainted with the defendant?

A. Not really well, but I mean I know him pretty good. I know what business he is in, and due to the fact that I am in the same type of business.

Q. Had you ever seen his own automobile?

A. Pardon me?

Q. Had you ever seen the defendant's own automobile?

A. No, sir.

Q. Now, after you left would you please relate to the jury all the incidents from the time you left the A J Tavern up to the time of the accident?

A. We stopped and had one drink of whiskey at Reseda Bowling. No. Tarzana Bowling Alley. Then we went from there down on White Oak Street, like I said. He started to drive fast, and I am afraid of fast driving, so I told him to slow down. He slowed down. Then on our way back, he started to drive fast again, maybe two or three times he did this. I told him to slow down, and then he slowed down.

Q. How fast was he going?

A. I don't know, but he was over the speed limit. I know [fol. 19] that.

Q. On what type of street was this?

A. This was on Ventura Boulevard, coming back. Then he was going to take me back to my friend's car.

Q. Would you tell us the events leading up to the time that the vehicle hit the tree? You stated he was speeding and he slowed down. How many times approximately did he do that?

A. Maybe three times or maybe four. I am not sure, but no more than that.

Q. Did the defendant at any time head his vehicle up Mecca Drive?

A. We were on the street, yes. I don't recall whether—I don't recall how we got on Mecca Street. You know, I wasn't paying any attention, really.

Q. Referring to the diagram that has been drawn on the board, if this is all right with the defense.

Mr. McGurrin: Surely.

By Mr. Pearman:

Q. Would you show us, by looking at the diagram, you can step up there with the Court's permission.

The Court: Yes.

I would just request a clockwise movement of it near the Court, so I can have a peek at what is on it. See that you can do it so the jury has a maximum view, but I'd like to see it also. I think you can move it back a little. I want to [fol. 20] be sure that all the jurors are able to see it.

Can you, Mrs. Lerbis, see it?

Juror Lerbis: Yes, I can.

The Court: Mr. Foss, can you see it all right from where you are?

Juror Foss: Yes.

The Court: You can, too, Mrs. Morgan?

Juror Morgan: Yes.

The Court: Go right ahead.

By Mr. Pearman:

Q. Mr. Eaker, would you show us approximately what street you were on and which way you were headed?

A. Truthfully speaking to you, I am not real familiar with the street.

Q. Have you ever been in this area before?

A. Only once or twice in that particular area. I really can't tell you which way we were going. Honest.

Q. Would you please tell us what you remember right before the accident?

A. I remember?

Q. The last thing that you remember.

A. I remember seeing a tree coming up and a lawn or the sidewalk, you know, and that is the last I remember. I know I yelled. I hollered, you know, and that is the last I remember.

[fol. 21] Q. Was this on Mecca Avenue?

A. I think so. As a matter of fact, I am almost positive it was, but as far as, you know, like I said.

Q. Was the defendant driving the vehicle at this time?

A. Yes, sir.

Q. To your knowledge, do you remember hitting anything before the tree? Can you remember anything right before the accident happened?

A. Nothing other than seeing this come up, seeing the lawn and the sidewalk.

Q. Now, after the accident were you knocked unconscious?

A. Yes, sir.

Q. What was the first thing you remembered when you came to?

A. I was in an ambulance, and I saw somebody over me. Then the next thing, then I passed out again. The next thing I remember I was in the hospital, and a doctor was, I guess, sewing my face up.

Mr. Pearman: I have no further questions.

Cross examination.

By Mr. McGurrin:

Q. Mr. Eaker, you say you arrived at approximately 10:00 P. M. on November 13th?

[fol. 22] A. Approximately that time, yes.

Q. Prior to arriving at that particular location, had you had anything to drink of an intoxicating nature?

A. No, sir.

Q. So that the first thing you had to drink was when you were at the A J?

A. Yes, sir.

Q. That was two beers?

A. Yes, sir.

Q. When you arrived at the A J, what means of transportation was used to get you there?

A. A friend of mine, Paul Washburn, I was with him.

Q. What is his name?

A. Paul Washburn.

Q. W-a-s-h-b-u-r-n?

A. Yes, sir.

Q. Isn't it a fact that you arrived at that location in a white Chrysler?

A. Yes, sir. Well, white and pink, or something like that.

Q. Wasn't that your car at that time?

A. No, sir. That belongs to Paul Washburn. It still does.

Q. When was the first time you ever spoke to a police officer that you recall after this particular accident?

[fol. 23] A. I think the next morning. I believe.

Q. Well, by that do you mean that would be the morning of the 14th then?

A. Yes.

Q. Was that in the Encino Hospital?

A. No, sir.

Q. Where was that?

A. In the General Hospital.

Q. Pardon me?

A. General Hospital.

Q. In the General Hospital?

A. In L. A.

Q. You had been transferred from Encino to General?

A. Yes, sir.

Q. What particular ward?

A. In the jail.

Q. Pardon me?

A. In the jail.

Q. In the jail?

A. In the jail ward. Yes, sir.

Q. What time had you arrived there in the jail ward?

A. I don't know.

Q. Pardon me?

[fol. 24] A. I don't know.

Q. Is the reason you don't know because you were unconscious or for some other reason?

A. Yes.

Q. That was the reason?

A. Yes.

Q. You were unconscious?

A. Yes.

Q. Do you remember either at the Encino Hospital or at the jail section of the General Hospital having a blood sample taken of yourself?

A. No, sir.

Q. You do not have any recollection?

A. No, sir.

Q. When you were at the Encino Hospital, do you know how long you were there? Do you remember or were you unconscious?

A. I didn't even know I was there until I was told later.

Q. So that after the accident the first thing you remember is coming to in an ambulance?

A. Yes.

Q. Then the next thing you remember is being in the Encino Hospital?

A. No, sir.

Q. Being in General Hospital?

[fol. 25] A. Yes, sir.

Q. So that you actually don't even remember being in Encino Hospital then?

A. Absolutely correct.

Q. You were told this sometime later on that you were there?

A. Yes. Yes.

Q. Do you recall that when you left the A J Club you say Mr. Schmerber was driving?

A. Yes, sir.

Q. And you were going to look at some masonary work on some apartment houses?

A. To see how far along the houses were.

Q. Do you remember who suggested that?

A. No, sir. I don't know if I did or if he did.

Q. That is actually your work, right, masonary?

A. Yes, and he is a roofer, and we both had a reason for going there.

Q. But you don't recall which one it was that suggested it?

A. No, sir.

Q. Do you remember also at this same time that you were in the process of moving?

A. At this same time I was in the process of moving?

Q. Yes, sir, on the 14th day of November, 1964. Didn't [fol. 26] you tell the officers you were in the process of moving, you didn't have your address?

A. Yes. Yes.

Q. Do you recall whether or not another reason for going with Mr. Schmerber was to show him an area where you contemplated moving to? Do you recall that?

A. No, sir. No, sir.

Q. How many drinks did you have before you got into the car with Mr. Schmerber?

A. Two beers.

Q. Two beers?

A. Yes, sir.

Q. Do you recall any time while Mr. Schmerber was driving along in this car that his nose started bleeding?

A. No, sir.

Q. Where was it that you turned around?

A. On White Oak.

Q. That is White Oak and what?

A. White Oak near Ventura Boulevard.

Q. In other words, you mean you had gone that far, and then the car was turned around, is that correct?

A. That is correct.

Q. Now, what direction is White Oak and Ventura from the A J Club?

A. East.

[fol. 27] Q. East?

A. Yes.

Q. Is that correct?

A. Yes.

Q. How far had you gone from the A J Club before the car was turned around?

A. Maybe one mile.

Q. Had you gone by the apartment house yet?

A. We passed the apartment and then turned around. The apartments were going up.

Q. Which ones were they?

A. The ones that we went to look at.

Q. Do you recall where they are located?

A. Not the number, but real near. They are on White Oak and real near Ventura Boulevard.

Q. You say they are on White Oak?

A. They are on White Oak. North of the boulevard.

Q. Do you recall at the point where the car was turned around that Mr. Schmerber brought the car to a stop? Do you recall that?

A. He brought the car to a stop?

Q. Yes, and stopped.

A. Yes. And he pulled up in a drive near there and backed out.

Q. Do you recall where that was?

A. On the same street, but down a little farther north [fol. 28] than the houses.

Q. Do you recall at the time he pulled up into this drive that he got out of the car and went into the back of the car?

A. No, sir, he did not.

Q. So far as you were concerned at this time when the car was turned around to head back, you weren't under the influence at that time, is that correct?

A. That is correct.

Q. And as far as you are concerned neither was Mr. Schmerber, is that correct?

A. That is correct.

Q. But you don't recall his getting out and getting in the back of the car?

A. He did not get out and get in the back of the car.

Q. When the car pulled into this particular drive, Mr. Schmerber stopped the car, didn't he?

A. Yes. He stopped long enough to put it in reverse to back out.

Q. Do you recall what officer it was that you first spoke to after this accident?

A. No, sir.

Q. Isn't it a fact that after the car was pulled into this driveway that Mr. Schmerber got into the back seat of the car and that you drove the car back from there?

[fol. 29] A. That is absolutely not true.

Q. Isn't it a fact that Mr. Schmerber had a bloody nose in the car? Do you recall that?

A. I don't recall seeing a bloody nose in the car. No, sir.

Q. Do you ever recall Mr. Schmerber having a bloody nose at any time on that particular evening of the 13th or the morning of the 14th?

A. No, sir.

Q. Isn't it a fact that you told the police officer that Mr. Schmerber was driving? That is, on November 14th that you told him that?

A. Yes, sir.

Q. Isn't it a fact that on the 13th and the 14th of November, 1964, that your driver's license was suspended?

A. My driver's license was suspended before that.

Q. In other words, it had been suspended since February 18, 1963?

A. Something like that. Yes, but I didn't know it until sometime in '64.

Q. But you knew it before this particular date?

A. Yes, sir.

Q. And your driver's license is still suspended?

A. Yes, sir.

Q. That is the reason you went to the jail and General [fol. 30] Hospital, is that correct, because you had a previous suspended violation that you hadn't answered?

A. It was that and a ticket.

Q. Right. In other words, you had a charge of driving with a suspended driver's license and another ticket which you haven't appeared on?

A. Yes, sir, one other ticket.

Q. Pardon me?

A. One other ticket.

Q. One other ticket in addition to the one for driving with a suspended driver's license?

A. Yes, sir.

Q. Now, your address was on Woodman Avenue on this particular date, on November 13th?

A. Yes.

Q. Do you recall that when you were asked your address by the police officer, that you couldn't give him the actual address other than Woodman in Van Nuys?

A. That is right. That is correct.

Q. How long had you been living at that address prior to this particular incident?

A. I think a month, but in the meantime I had been on vacation.

Q. Did you ever see Mr. Schmerber after this accident other than appearance in court?

A. I have seen him, I think, once or twice.

[fol. 31] Q. Since the accident other than in court?

A. Yes.

Q. At the A J Club you and he talked about masonary work and other construction work, is that correct?

A. That is correct.

Q. Do you recall also that you told the police that you didn't know what you hit?

A. It was the next morning. I didn't know.

Q. You didn't know until somebody told you, is that correct?

A. Until somebody told me. That is correct.

Q. Also, you didn't know how fast you were going?

A. That is correct.

Q. Also, you didn't know how fast you were going?

A. That is correct.

Q. You didn't know how the accident happened?

A. Not really. No, sir.

Mr. McGurrin: Nothing further.

The Court: Any redirect?

Mr. Pearman: No, your Honor. I have no further questions.

The Court: You may step down.

Thank you very much, Mr. Eaker. Will this witness be needed by you?

Mr. McGurrin: No. I don't believe so, unless you want to keep him for some reason or other.

[fol. 32] Mr. Pearman: No.

The Court: I don't want to excuse him if you are going to need him, but if you are sure you won't, I will excuse him. In any event, in view of the order for exclusion of witnesses I have granted, I will ask him to step outside. We can determine after the session is over this afternoon whether he will be permanently excused. Thank you.

Mr. Pearman: Your Honor, would it be possible to have a brief recess?

The Court: You say brief. Would 10 minutes be sufficient?

Mr. Pearman: Thank you.

The Court: We will recess for 10 minutes, ladies and gentlemen.

You are admonished that you are not to discuss the subject of this case with any other person, nor with each other, nor to form any opinion or to express any opinion on the facts of this case until it is finally submitted to you. We will reconvene at 3:30. That is by the courtroom clock.

We are in recess.

(Short recess.)

The Court: We will reconvene now, ladies and gentlemen.

May it be stipulated that the defendant and all members [fol. 33] of the jury are present at this time?

Mr. Pearman: May we excuse Mr. Eaker?

The Court: He may be excused.

Do we have a stipulation that the members of the jury are all present?

Mr. McGurrin: So stipulated.

Mr. Pearman: So stipulated.

The Court: The record will indicate that the defendant is likewise present.

You may proceed.

Mr. Pearman: The People call Bruce E. Davidson.

BRUCE E. DAVIDSON was called as a witness by and on behalf of the People, and having first been duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, sir?

The Witness: Bruce E. Davidson. D-a-v-i-d-s-o-n.

Direct examination.

By Mr. Pearman:

Q. Mr. Davidson, what is your occupation?

A. Contractor.

Q. Where is your home?

[fol. 34-35] A. 5208 Mecca.

Q. Now directing your attention to the diagram on the board, would you point out to the jury approximately where on the diagram your home would be located?

A. The square where it's got the address 5208 Mecca.

Q. That is your home?

A. Yes, sir.

Q. Could you just walk over and point to it?

A. (Pointing.)

Q. With the Court's permission, would you just stand there? Now, on November 13, 1964, were you at your home on this particular evening?

A. Yes.

Q. Were you at home at approximately 11:55 P. M.?

A. Yes.

Q. Would you please tell the jury and the Court what you were doing at this time?

A. I was sitting in my den when I heard skid marks.

Q. What was the first thing you did after you heard the skid marks?

A. I ran outside. It sounded like he wiped out my car. It sounded like someone hit the side of my car parked on the street.

Q. Please tell the jury what you observed at this time.

[fol. 36] A. At the time I ran out I didn't see anything, and finally I saw a car parked over here, smoking, and it was wrecked.

Q. Did you observe anything else—

Mr. McGurrin: For the record, may it indicate that he pointed to the circle on the west side of the diagram?

The Court: Do we have any crayons here?

The Witness: Yes.

The Court: Would you do this for me? If no objection by counsel, would you first draw a little line to your own house? Just draw a line away from it and mark that point D-1, simply indicating D for Davidson. That is the point you have identified.

The Witness: (Drawing.)

The Court: Draw a line from that to the house.

The Witness: This is the house.

The Court: Draw it from D-1.

The Witness: (Drawing.)

The Court: That is right. Now at the second point also just make an X mark for the point which you have indicated that you saw this vehicle, and from the X to another point make that D-2, if you would, in the same manner.

The Witness: (Drawing.)

The Court: Very good. Go right ahead.

[fol. 37] By Mr. Pearman:

Q. Mr. Davidson, when you came out of your home, did you observe anything before you saw it smoking, the car?

A. No.

Q. Did you observe the island in front of your house?

A. Yes.

Q. What did you observe about the island?

A. I didn't observe the island until I crossed over it. At that time this sign had been knocked down, the one right here on the corner of the island.

Q. Do you remember observing this sign earlier in the day to your knowledge?

A. Not to my knowledge, no. Not that day, but I see it every day.

Q. It hadn't been broken off, to your knowledge, before this particular evening?

A. No.

Q. Now directing your attention to D-2, which you have labelled at the top left corner of the diagram, what is at the corner? What does that circle represent?

A. This circle represents a tree.

Q. How far would you say that is from your home labelled D-1 to the tree?

A. Seventy-five yards.

[fol. 38] Q. Would you please tell the jury now when you arrived at the tree what you observed at this time?

A. A car had gone through the tree completely, and—

Mr. McGurrin: I am going to move to strike that as a conclusion of the witness. He can just testify what he observed, not what he thought happened.

The Court: The motion is granted.

Just tell us what physically was the condition.

The Witness: A wrecked car with two men in it.

By Mr. Pearman:

Q. What type of tree is the tree at the spot labelled D-2 on the board?

A. I wouldn't know.

Q. Could you make an estimate as to how big the tree is?

A. About 12 inches in diameter.

Q. Now, did you look into the vehicle when you arrived at the tree?

A. Yes.

Q. What did you see inside the vehicle?

A. Two men.

Q. Could you recognize one of the men that was in the car this particular evening?

A. Yes.

[fol. 39] Q. Is he seated in the courtroom?

A. Yes.

Q. Could you point him out for the jury?

A. The gentleman right here.

Q. What was his approximate position in the vehicle?

A. He was behind the wheel.

Q. This is on Mecca Avenue, is that correct?

A. Yes, sir.

Q. What was the position of the other man that was in the vehicle?

A. He was pinned down underneath the right side of the right front seat, down underneath the glove compartment.

Q. Have you seen this other gentleman in the courtroom today?

A. Yes.

Q. Is that Mr. Eaker?

A. Yes.

Q. Now, what was the first thing that you did after you got to the car?

A. I pulled Mr. Eaker out of the car.

Q. Then what was the next thing you did after that?

A. I laid him out on the sidewalk. He was unconscious more or less, and I sent for an ambulance, called an am-[fol. 40] bulance.

Q. Did you at any time come in contact with the defendant?

A. Yes.

Q. Did you observe anything about the defendant?

A. Yes. He was walking away from the accident. I think he was in shock or something. I tried to get him to stop and lay down. He was bleeding pretty badly.

Q. Did you smell any alcohol on the defendant's breath?

A. I smelled alcohol. I couldn't say it was on either one of their breaths.

Q. Did you see the defendant get out of his vehicle?

A. Yes.

Q. Out of the vehicle. Where was the defendant when you called the ambulance and the police?

A. He was kind of wandering around. Actually, he was walking from this point here up the sidewalk or up the street this way, north on Mecca.

Q. Did he have anything to say to you at any time?

A. No.

Q. Approximately how long after you made the call did the ambulance show up?

A. About 10 minutes.

[fol. 41] Q. Did the police show up?

A. Yes.

Q. When did they show up?

A. Right afterwards.

Q. After the ambulance had arrived?

A. After the ambulance.

Q. What did you observe from the time the ambulance showed up to the time the police officers arrived?

A. Well, this gentleman here and Mr. Schmerber, they were trying to get him, there were a lot of people there, and they were trying to get him to settle down. He was walking away from the accident; I think from shock or just trying to hold everybody intact. He was bleeding pretty badly.

Q. Now, when the police officers arrived on the scene, what did they do?

A. Well, the normal investigation, I guess, you'd call it. They checked the car, the people around, all the witnesses.

Q. Was the defendant and Mr. Eaker, were they still present when the two police officers arrived?

A. Yes.

Q. Mr. Davidson, Mecca Avenue, what town is that located in?

A. Tarzana.

[fol. 42] Mr. Pearman: I have no further questions.

The Court: You may cross-examine.

Cross examination.

By Mr. McGurrin:

Q. How far is this location where you reside, sir, from Ventura and White Oak?

A. Well, I am approximately one block from Ventura, and I couldn't tell you how far it is from Ventura to White Oak.

Q. What direction is the location of Mecca Avenue from Ventura and White Oak?

A. It would be south.

Q. South. East or west?

A. My residence?

Q. Yes. Is your residence—

A. My residence is on Mecca, or it's on Reseda. I really don't know. Reseda Boulevard has just been extended through at this point, and my address is still Mecca, but it's really so far as I am concerned on Reseda Boulevard.

Q. In other words, you have indicated that your residence is south of Ventura and White Oak. Can you indicate to me whether or not it is east or west of Ventura and White Oak?

A. (No response.)

[fol. 43] Q. It's got to be one side of it, unless it's an even line south. In other words, Ventura and White Oak isn't directly north of your residence, is that correct?

A. No. White Oak would be east.

Q. East?

A. Yes.

Q. White Oak is east of your residence?

A. Yes.

Q. When you say the defendant was bleeding, do you recall what area you observed him bleeding?

A. I believe he was bleeding about the head.

Q. Do you recall any in the nose area?

A. I don't really recall, no.

Q. All you recall is the bleeding?

A. Yes.

Q. Do you recall whether or not his clothes when you first saw him, did you see his clothes?

A. Yes. I saw his clothes.

Q. Do you recall whether or not there was any blood on the front portion of his clothes above his waist?

A. I don't really remember.

Q. Mr. Eaker, he was also bleeding, is that correct?

A. Yes.

Q. The car it appeared to you to be about totally de-
[fol. 44] molished?

A. Totally.

Q. Now, Mr. Schmerber got out of the car then himself, is that correct?

A. Yes.

Q. Did he go through a door or through a window?

A. He came out through the windshield.

Q. Through the windshield?

A. Yes.

Q. When you saw him coming out through the windshield, where were you located at that time?

A. Standing right beside the car on the right-hand side.

Q. That would be the passenger side?

A. Yes, sir.

Q. Do you recall at the location seeing a person by the name of Mr. Yellin, M. S. Yellin, Y-e-l-l-i-n?

A. I don't recognize him by name, no.

Q. Was there anyone else in the house with you other than yourself? Do you have a family?

A. Yes.

Q. Was there any other person visiting there or not?

A. Yes.

Q. Who was that?

A. Two boys. My boy and another boy.

[fol. 45] Q. Were you fully dressed at the time you heard the crash?

A. Yes.

Q. When you first got outside, then you didn't see anybody initially, is that correct?

A. (No response.)

Q. As soon as you walked out or ran out or however you exited from the house, you looked in the area and you didn't see anything unusual, is that correct?

A. Well, for a moment, possibly a couple of seconds.

Q. Now, you say it's 75 yards from your house to the location of the car, is that correct?

A. Yes.

Q. Are there other homes on Mecca Avenue before you get to the point where the car and the tree were on the west side?

A. No.

Q. Pardon me?

A. On the west side, yes. On the west side.

Q. In other words, there would be cars, if you look at the diagram there, which would be on the west side of Mecca Avenue or houses, I mean, is that correct?

A. Yes.

Q. Then when you saw the car, you saw it was smoking, is that correct?

[fol. 46] A. Yes.

Q. And then you went over to it?

A. Yes.

Q. When you saw Mr. Eaker, he was down on the floor, is that correct?

A. Yes.

Q. Do you remember the seats in the back of the car? Could you see the back seat in the car?

A. Yes.

Q. Do you recall what condition they were in whether they were moved or still stationary in the same spot they'd normally be in?

A. As I remember, they were all forward.

Q. All forward?

A. Yes.

Q. Do you recall the condition of the front seat? Was it a split front seat?

A. No.

Q. It was a solid front seat?

A. Yes.

Q. Was the front of the car as well as the side of the car damaged?

A. The front of the car was demolished. The side of the car, well, it was pretty badly damaged. I wouldn't say the rear portion of the car. The whole car. I couldn't find anything that wasn't bent on it.

[fol. 47] Q. Was all the glass broken in it to the best of your recollection and all the windows, front, back, sides?

A. Pretty much on the front and sides, yes.

Q. There is no lighting in this immediate area where the car and the tree were, is that correct?

A. No, sir.

Q. That is correct what I said, there is no lighting?

A. Yes. There was no lighting.

Q. Did you have a flashlight by any chance when you went there?

A. No, I did not.

Q. When you arrived at that particular location where the car and the tree was, was there any other individual outside the car other than yourself?

A. Not immediately, no.

Q. How long afterwards was it before someone else arrived?

A. Fifteen or 20 seconds.

Q. Was that a male or a female?

A. A male.

Q. Do you know that person?

A. No.

Q. Is it fair to say that the defendant when you saw him appeared to be in a dazed condition when he was walking [fol. 48] along?

A. Yes.

Q. Did you note whether or not there was any limping on his part or not?

A. I didn't notice.

Q. How much time would you actually say elapsed from the time that you heard the crash to the time that you actually arrived at the point of the car?

A. About 20 seconds.

Q. Did you run over there?

A. Yes.

Q. Did you make any written statement at any time with respect to what you observed this particular time?

A. No.

Q. Did you give any statement to the police at this time on the morning of the 14th or the evening of the 13th or any other time?

A. Just my own identification.

Q. But you didn't give any statement as to what you observed, is that correct?

A. Not that I recall, no.

Q. Did you look at any type of statement today for the purpose of refreshing your recollection as to what occurred on this particular date?

A. No.

[fol. 49] Q. Other than the blood on the face of Mr. Schmerber, could you see any other signs of injury?

A. No.

Q. When you first saw Mr. Schmerber, was he moving?

A. Yes.

Q. Was he commencing to move through the window area through this opening in the windshield?

A. No. Not when I first saw him. No.

Q. What direction was he moving when you first saw him?

A. He was behind the wheel, sitting in the car.

Q. You said he was moving when you first saw him?

A. Well, he was moving around.

Q. Pardon me?

A. He wasn't moving in any direction.

Q. Was he moving his head? Was he moving his shoulders? Was he moving his arms?

A. Yes. He was just moving his body, in a sitting position.

Q. Moving the upper portion of his body?

A. Yes.

Q. Were the lights in the car on at this time?

A. No.

Q. So your observations were unaided by any lighting in the area, is that correct?

[fol. 50] A. At this point here my boy had brought a big spotlight with him.

Q. At what point was this? How long after you got there?

A. Maybe another couple of minutes.

Q. In other words, that is when you first observed him in this particular location behind the wheel, is that correct?

A. No. I could observe it. It wasn't that dark.

Q. You say you were on the passenger side when you first observed him, is that correct?

A. Yes.

Q. There was no lighting at all in the area, is that correct?

A. No street lights, no.

Q. When your boy came with the light, where was Mr. Schmerber at that time? This is two and a half minutes later.

A. He was just coming out through the windshield.

Q. Did you help him out?

A. No.

Q. Did anyone help him out?

A. Not that I recall.

Q. Do you recall whether or not he had a shirt on, a sweater on, or anything else on top?

[fol. 51] A. I don't recall.

Q. He walked in a northerly direction, is that correct?

A. Yes.

Q. It was approximately 15 minutes later that the police arrived?

A. Yes.

Q. When they arrived, the defendant, Mr. Schmerber, was in the ambulance, is that correct?

A. I don't recall.

Q. Do you know where Mr. Eaker was when the police arrived?

A. I don't recall whether they were both in the ambulance or being put into the ambulance or when the police did arrive.

Q. Did you ever look at the back seat of the car, to see whether or not there was any blood on it?

A. No, I didn't.

Mr. McGurrin: I have nothing further.

The Court: Is there any redirect?

Mr. Pearman: I'd like to ask one more question.

The Court: Yes.

Mr. Pearman: May I approach the board?

The Court: Yes. Go ahead.

[fol. 52] Redirect examination.

By Mr. Pearman:

Q. Mr. Davidson, would you please explain the way this road curves? Is that on a curve?

A. It's on a very, very slight curve, yes. Practically straight.

Mr. Pearman: Nothing further, your Honor.

The Court: For the record, the question referred to the portion of Reseda on the diagram proceeding from north to south and going in the area by the point indicated as D-1.

Is there any further cross?

Mr. McGurrin: Yes.

Recross examination.

By Mr. McGurrin:

Q. What street runs east and west below Mecca and Reseda Boulevard at that location? Is there any street there?

A. Yes. Approximately another, about 200 feet, there is a street. I can't tell you the name of it.

Q. Where is it with respect to Ventura Boulevard?

A. Ventura would be north.

Q. In other words—

A. One block about.

Q. One block north?

[fol. 53] A. You say Ventura Boulevard?

Q. Yes.

A. That would be approximately at the top of the diagram.

Q. In other words above or north of the point D-2, which is the tree and the car, is that correct?

A. Yes.

Q. When you saw the car, what direction was the front of the car headed?

A. North.

Q. North?

A. Yes.

Q. Toward Ventura?

A. Yes.

Mr. McGurrin: Thank you very much.

The Court: Is there anything else?

Mr. Pearman: I have nothing further.

The Court: May the witness be excused?

Mr. Pearman: Yes, your Honor.

The Court: Any objection?

Mr. McGurrin: No. None, your Honor.

The Court: Very well. Thank you very much. You are excused, Mr. Davidson.

The Witness: I won't be called again?

The Court: You won't be called again so far as I am aware. You need not come back unless you are ordered to [fol. 54] do so.

At this point, ladies and gentlemen, I think this is as good a stopping point as any.

Is there anybody on the jury who can't be here at 9:15 tomorrow morning?

(No response.)

Very well. We will stand in recess until 9:15 tomorrow morning.

I will again give you the admonition in long form.

You are not to discuss this matter with any other person, nor with each other. You are not to form an opinion or express an opinion on the facts of this case until it is finally submitted to you. See you tomorrow morning at 9:15.

We are in recess.

Is there any objection to a stipulation that the admonition need not be given in long form, but the jury may simply be reminded of it at subsequent recesses?

Mr. McGurrin: No. I will so agree.

The Court: Is that satisfactory, Mr. Pearman?

Mr. Pearman: So stipulated.

The Court: May it also be stipulated that the jury and the defendant will be deemed to be present, unless it is indicated to the contrary?

Mr. McGurrin: Yes. So stipulated.

[fol. 55] Mr. Pearman: So stipulated.

The Court: Very well. We are in recess.

(Whereupon, at 4:00 o'clock P. M. an adjournment was taken until 9:15 o'clock A. M. Tuesday, April 27, 1965.)

[fol. 56]

Los Angeles, California, Tuesday, April 27, 1965

9:25 A. M.

The Court: Good morning, ladies and gentlemen.
We will proceed with the Schmerber case.
Call the People's next witness.
Mr. Pearman: Yes, your Honor.
The People would like to call Officer Schillo.

JOHN T. SCHILLO was called as a witness by and on behalf of the People, and having first been duly sworn, was examined and testified as follows:
The Clerk: Will you state your name, sir?
The Witness: Schillo. John T. Schillo. S-c-h-i-l-l-o.

Direct examination.

By Mr. Pearman:

Q. Officer Schillo, what is your occupation?
A. Police officer, Los Angeles City.
Q. Where are you assigned?
A. On the 14th?
Q. No. Where are you assigned at present?
A. In West Valley Division.
Q. On November 14, 1964, where were you assigned at [fol. 57] that time?
A. West Valley Desk.
Q. At this time what was the nature of your activities at the desk?
A. I am also in charge of Property Transfer.
Q. Now directing your attention to November 14, 1964, approximately what time did you come to work on this day?
A. 4:00 P. M.
Q. At 4:00 P. M. at this time did you transfer any property, directing your attention to Mr. Schmerber?
A. Yes. May I explain?
Q. Yes.
A. When I reported for duty at 4:00 P. M., I was informed by the—

Mr. McGurrin: Excuse me, officer. I object to any information constituting hearsay. He can answer the question asked by counsel without explaining it really.

The Court: I will sustain the objection.

Do not tell us what you were informed. You can tell us you had certain information. You can respond to counsel's question without indicating specifically what the conversation was.

(The record was read by the reporter.)

Mr. Pearman: I will rephrase the question.

Q. Without stating the nature of the information, did [fol. 58] you get some information when you first came to work?

A. Yes.

Q. After receiving this information, what was the first thing that you did?

A. I checked to see if we had a blood sample in the drawer that was locked securely.

Q. Did you find such a sample in the drawer?

A. Yes.

Q. What was the next thing after you found this?

A. I checked to make sure that the messenger was notified regarding the pickup of this property.

Q. Who was the messenger that was so notified?

A. May I refer to this?

The Court: You have a document?

The Witness: Yes. This is the property transfer, and the messenger's name was Azzolino, A-z-z-o-l-i-n-o. This is the property transfer.

By Mr. Pearman:

Q. Officer, directing your attention to this property prisoner transfer record, would you see if your signature or your name is on that transfer?

A. Yes. In this blank that is provided for the desk officer transfering property.

Q. Does this particular transfer have the name of the defendant?

A. Yes. It's Armando—

[fol. 59] Mr. McGurrin: Pardon me. The thing speaks for itself. If it's going to be introduced in evidence, it would be competent. I object to the officer reading off of it, because the document does speak for itself. If it's not going to be introduced, it would be hearsay, immaterial.

The Court: I assume you are not going to object to the document itself being received.

Mr. McGurrin: No.

The Court: Well, I will sustain the objection.

Mr. Pearman: Your Honor, could we have this marked as People's 1 and move that it be put in evidence?

The Court: There being no objection, so admitted. Without going to the preliminary formalities, I will receive the property transfer slip. Is that what it is?

The Witness: Yes.

The Court: It may be received as People's Exhibit 1.

By Mr. Pearman:

Q. Officer Schillo, was this transfer slip made in the regular course of business by you?

A. No.

Q. Who prepared the slip?

A. The preceding watch.

Mr. Pearman: I have no further questions.

[fol. 60] Cross examination.

By Mr. McGurrin:

Q. This particular drawer you are referring to, officer, that the sample was in, was that just an ordinary drawer with a lock on it?

A. Yes, at the desk.

Q. It was not refrigerated or anything?

A. No.

Q. Did you actually see this gentleman, whose name you referred to, pick up this particular sample for evidence?

A. Yes. The messenger?

Q. Yes.

A. Yes.

Q. Approximately what time was that that you picked it up?

A. I don't recall.

Q. Was it on the same day of the 14th?

A. It was on the 14th during my tour of duty.

Q. Somewhere between?

A. 4:00 P. M. and midnight.

Q. On that particular form People's 1 is there a specific location where the individual who is to pick up the form is supposed to sign, indicating that he picked up the sample?

A. Yes. In the right-hand corner.

[fol. 61] Q. In other words, where it says "Person transporting"?

A. Yes.

Q. Below it says, "date and time received." Is that supposed to be filled in or not?

A. Yes.

Q. It wasn't in this particular case, though?

A. No.

Q. Do you know any reason why it was not filled in?

A. No.

Q. Here it has "Person receiving," and it says "signature and serial number." There is nothing indicated in there that anyone received it there, is that right?

A. Yes. That is correct.

Q. That also is supposed to be normally filled in, is that correct?

A. Yes.

Q. You didn't see the sample being put in the drawer, is that right?

A. No, I did not.

Mr. McGurrin: Thank you. I have nothing further.

[fol. 62] Redirect examination.

By Mr. Pearman:

Q. Officer, the sample, would you please explain how it was contained as you observed it?

A. I handled an envelope in the transfer, which contained a hard object which was sealed with a wax seal. I assume it was glass inside.

Mr. Pearman: Nothing else, your Honor.

Recross examination.

By Mr. McGurrin:

Q. In other words, you didn't open it simply because it was sealed?

A. Yes. It was sealed.

Mr. McGurrin: I have nothing further.

The Court: I take it this witness may be excused.

Mr. Pearman: Yes, your Honor.

Mr. McGurrin: Yes.

The Court: Thank you very much, Officer Schillo. You are excused.

Mr. Pearman: Officer Ranlett.

William H. Ranlett was called as a witness by and on behalf of the People, and having first been duly sworn, was examined and testified as follows:

[fol. 63] The Clerk: Will you state your name, sir?

The Witness: William H. Ranlett. R-a-n-l-e-t-t.

Direct examination.

By Mr. Pearman:

Q. Officer Ranlett, what is your occupation, sir?

A. Police officer, city of Los Angeles.

Q. Were you so employed on November 14, 1964?

A. I was.

Q. On November 14, 1964, what was your occupation at that time?

A. Police officer.

Q. As such, what are the nature of your activities? To which division are you assigned?

A. Property Division.

Q. Where?

A. 150 North Los Angeles Street, room G8.

Q. What are the nature of your duties at Central Property?

A. We take in evidence and found property and safekeeping property and we store it.

Mr. Pearman: I'd like to introduce this property prisoner transfer record, your Honor—the defense attorney said he will not object to the introduction of this—as People's 2 and move it be put in evidence.

[fol. 64] The Court: There being no objection and no further foundation being laid—

Mr. McGurrin: That is right. I do not object to it.

The Court: With that understanding, the prisoner property transfer record may be marked People's Exhibit 2 and may be received in evidence.

Mr. Pearman: We have no further questions.

The Court: Very well.

Mr. McGurrin: No questions.

The Court: Are there any questions?

Mr. McGurrin: No.

The Court: I take it this witness may likewise be excused.

Mr. McGurrin: Yes.

Mr. Pearman: Yes.

The Court: Thank you very much, officer.

I trust these witnesses that have departed, the items that are received in evidence are remaining.

Mr. Pearman: Yes, your Honor.

The Court: All right.

Mr. Pearman: Call Officer Slattery.

EDWARD A. SLATTERY was called as a witness by and on behalf of the People, and having first been duly sworn, was [fol. 65] examined and testified as follows:

The Clerk: Your name?

The Witness: Edward A. Slattery. S-l-a-t-t-e-r-y.

Direct examination.

By Mr. Pearman:

Q. Officer Slattery, are you a police officer of the city of Los Angeles?

A. Yes.

Q. To which division are you assigned?

A. North Hollywood.

Q. On November 14, 1964, at approximately 12:00 o'clock A. M. were you listening to your police radio at this time?

A. Yes.

Q. Did you receive a call?

A. Yes.

Q. What was the first thing you did after receiving this call?

A. Proceeded toward the location that we were given.

Q. Where was that?

A. 5200 block Mecca Avenue.

Q. On this particular evening were you working in con- [fol. 66] junction with another officer?

A. Yes.

Q. Who was that officer?

A. Officer Buell.

Q. Upon arriving at Mecca, what was the first thing you observed?

A. A wrecked car.

Q. Directing your attention to the diagram on the board, would you please tell the jury the position of the car?

A. Yes. Do you want me to draw it in?

Q. With the Court's permission, yes.

The Court: Yes, indeed. If you could make some indication as to what you saw and perhaps if you would indicate, well, the first item, perhaps, is 1, indicating S for Slattery and the first point you identify and similarly with any other points.

The Witness: When I arrived at the particular location, the car was sitting in a position about here. This is S-1.

This location right here there is a sidewalk that runs down here, and there is a parkway along here as well. The car at that time was sitting on the front lawn in front of a house. I believe the address at that location was 5243 Mecca.

[fol. 67] By Mr. Pearman:

Q. Was there a tree in this vicinity, officer?

A. Yes.

Q. What would be the approximate location of this tree?

A. Well, the tree is at D-2, but at that time it was draped over the back of this car in a manner such as this.

Q. Did you later in your investigation measure the tree?

The Court: For the record, the witness has indicated S-2 as the position of the tree when he saw it. There is a question still pending, however, which you will answer, please, as to whether you measured the tree.

The Witness: Did I measure the tree? In what way?

Mr. Pearman: In the diameter of the tree.

The Witness: No. I can estimate it.

By Mr. Pearman:

Q. Would you estimate it for the record, please, officer?

A. It's approximately 12 inches in diameter.

Q. Now, when you arrived at the scene, was there any other vehicle that had arrived at this time?

A. Yes. The ambulance was there.

Q. Would you please tell the Court and the jury what [fol. 68] you observed? Did you observe the defendant at this time?

A. Yes.
Q. Where was he?
A. They were just putting him into the ambulance.
Q. Were you able to observe his face at this time?
A. Yes.
Q. Would you please tell the jury what you observed?
A. Blood.
Q. Did you smell any alcohol on the defendant's breath?
A. Yes.
Q. Were you able to see the defendant's eyes?
A. Yes.
Q. Would you please characterize what you saw?
A. Well, at that time, I don't know exactly how to describe it. Bloodshot, watery, sort of a glassy appearance.
Q. Did you talk to the defendant at this time?
A. No.
Q. Now, did you observe Mr. Eaker?
A. Yes.
Q. Where was he?
A. He was already in the ambulance.
Q. Would you please tell the jury what you did after ob-
[fol. 69] serving the defendant and Mr. Eaker?
A. Well, after that we proceeded with the investigation, to determine what had taken place.
Q. Would you please tell the jury approximately the steps you took in making your investigation?
A. Well, we tried to determine where he had come from and how he had gotten to the particular location.
Q. Would you please explain how you did this? What were the steps that you took?

Mr. McGurrin: I am going to object to this as being hearsay and incompetent and immaterial as to what he did to determine anything. It would be immaterial.

The Court: I think it would be at this stage. I think he is qualified in this particular field of accident investigation that he can state his opinion, and he certainly can be asked

on cross examination whether he formed an opinion. I think the objection is well taken at this point. Sustained.

By Mr. Pearman:

Q. Officer, after the investigation, what was the next thing that you did?

A. After the investigation?

Q. Yes.

A. After completion of the investigation we went to Encino Hospital.

Q. What did you do there?

[fol. 70] A. Talked to the defendant.

Q. Where was the defendant when you talked to him?

A. He was in one of the little treatment rooms.

Q. Who was present when you had this conversation with the defendant?

A. Well, part of the time the nurse was present. Part of the time the doctor was present. Part of the time nobody.

Q. Did you at this time inform the defendant of his constitutional rights?

A. Yes, I did.

Q. What were those rights?

A. I informed him that he was under arrest and that he was entitled to the services of an attorney, and that he could remain silent, and that anything that he told me would be used against him in evidence.

Q. Were you able to observe the manner in which the defendant spoke at this time?

A. Yes.

Q. How did the defendant speak?

A. Well, he had a slightly slurred speech and slow talking.

Q. Officer, at this time had you formed an opinion as to whether the defendant was under the influence of an alcoholic beverage?

A. Yes.

[fol. 71] Q. What was your opinion?

A. It was my opinion that he was under the influence of alcohol.

Q. How long have you worked on the Los Angeles Police Force?

A. Eighteen years.

Q. Over this 18 year period have you had occasion to observe people that you felt were under the influence?

A. Yes.

Q. Would you please relate any conversation that took place directly after you informed the defendant of his constitutional rights?

Mr. McGurrin: I am going to object to the question and request permission to approach the bench.

The Court: All right.

We will let the objection remain unruled on at this time.

(Discussion at the bench between the Court and counsel, as follows:)

Mr. McGurrin: I presume after reading the arrest report and listening to the question of counsel that the officer will relate conversation which he indicated in his opening statement to the jury.

The Court: As to the blood being extracted, is that correct?

Mr. Pearman: That is correct.

[fol. 72] Mr. McGurrin: Also as to the conversation as to what he had to drink, where he was and who he was driving with.

Mr. Pearman: Yes.

Mr. McGurrin: My objection is this, that I submit the evidence is insufficient at this time to indicate an intelligent waiver on the part of the defendant of his constitutional right to counsel and that he knew and understood what the officer said to him at the time that he allegedly advised him of his constitutional rights. I would like to take the officer on voir dire, and if necessary put the defendant on the witness stand to testify.

The Court: I will do this at least initially. I guess you get two bites at it. I think I have to make a preliminary ruling.

Mr. McGurrin: Yes. This is offhand. I don't think I have to do that. So far as I am concerned, I am happy to leave that specific point to your Honor for a decision.

The Court: I was simply going to make a preliminary ruling on it. Let's excuse the jury now rather than complicating it and go into chambers and excuse them, and I will hear this evidence now, and I will make the determination as to whether it appears to be an intelligent waiver and whether or not it's necessary anyway in view of the nature [fol. 73] of the statements which were elicited, which are admissions, if the opening statement is correct.

(End of discussion at the bench.)

The Court: Ladies and gentlemen of the jury, the problem that is presented at this point is a legal problem, and I am going to excuse the jury, so that we can determine whether a certain line of testimony is or is not admissible. You are not to be concerned with the specific reasons for this legal determination, and at this time I am going to excuse you. I would think that it would certainly be at least 10:00 o'clock before the jury will be reconvened. Please don't go too far away beyond 10:00 o'clock, so we can call you back.

At this time the record will indicate the jury is excused, and we will proceed in the absence of the jury with the presence of counsel and the defendant.

(At this point the jury left the courtroom.)

(The question was read by the reporter.)

The Court: I will defer ruling. Mr. McGurrin wants to take the witness on voir dire.

Voir Dire examination.

By Mr. McGurrin:

Q. Officer, did you place the defendant under arrest before or after you told him about his right to counsel?

[fol. 74] A. Before.

Q. What time was it that you advised him of his rights?

A. I don't know.

Q. Pardon me?

A. I have no idea.

Q. Is there any way by referring to your report in this case to indicate what time it was?

A. No.

Q. What time did you finish with your investigation of the accident?

A. About 12:50.

Q. 12:50?

A. 50, yes.

Q. So it would be sometime subsequent to that?

A. Yes.

Q. How long did it take you to get from the scene of the accident to the location of the hospital?

A. Oh, roughly 10 minutes.

Q. Now, you prepared a 520 form in this case, is that correct?

A. Yes.

Q. That form indicates that you started questioning the defendant with respect to the questions in that form at 1:30, is that correct?

[fol. 75] A. That would be reasonably correct, yes.

Q. So does that in any way enable you to determine then what time it was that you first advised him with respect to the right to counsel?

A. Well, I would say it was somewhere in that area. I mean during those hours, but specifically, I don't know what time it was.

Q. At the time you told him this, was he sitting up, lying down, or walking around?

A. He was sitting up.

Q. Who was there at that time when you told him of his right to counsel?

A. I believe Dr. Brooks was present, but I couldn't be positive.

Q. You testified that, seeing his eyes, they had a glassy appearance, watery, and bloodshot. That same condition existed at the hospital?

A. Yes.

Q. Did you observe the doctor to give any medication to the defendant prior to the time you had a conversation with him?

A. No.

Q. Did you ask the defendant whether or not he understood what a right to an attorney meant?

A. Well, not specifically that, no.

Q. Are you indicating that you asked him something else [fol. 76] which was close to that?

A. No. I am indicating that I advised him of his rights and then asked him if he understood.

Q. Do you specifically recall asking whether or not he understood the rights that you just finished telling him?

A. Yes, I do.

Q. What did he say?

A. He said that he did.

Q. Did he say, "Yes, I do," or what?

A. He just said, "Yes."

Q. You could understand him?

A. Yes.

Q. You asked him questions over what period of time then?

A. Well, I'd say from when I first started a conversation with him up until the time he was booked. I had off and on conversations with him during that period of time.

Q. When was he booked then?

A. I don't know the exact time.

Q. Can you refer to your report, to determine the time?

A. Yes, I could.

Q. Would you do that, please?

A. The arrest report. He was booked at 2:35 A.M.

[fol. 77] Q. Will you also look at the arrest report right next to date and time and where it says date and time arrested, 11-14-64, 1:45 A. M., date and time arrested, is that correct?

A. Yes.

Q. Is that correct?

A. Reasonably so, yes.

Q. You testified earlier that you had arrested him previous to advising him of his constitutional rights, is that not correct?

A. Yes.

Q. There is a discrepancy between what you testified before and what this report indicates as far as the time is concerned of arrest, is that correct?

A. I have never testified as to what time I arrested him.

Q. I thought you indicated it was somewhere between 1:00 o'clock and 1:30 that you started your 520 test at 1:30.

A. No. I didn't say I arrested him at that time. I didn't say he was arrested at the time the 520 was started.

Q. Is it your testimony, then, that you didn't arrest him until after the 520 was started, is that correct?

A. As I recall, there was never a formal 520 given.

[fol. 78] Q. You filled out a 520 form?

A. That is correct.

Q. On the 520 form you wrote down that you started at 1:30 A. M. in the morning?

A. Yes.

Q. Now, is that incorrect?

A. No.

Q. That is correct?

A. That is correct.

Q. When you first started testifying today after the jury left, you testified that you placed him under arrest and

advised him of his constitutional rights sometime between 1:00 o'clock and 1:30, isn't that correct?

A. Well, probably it would be reasonably correct, yes. Specific times, now, I don't look at my watch every time I make a statement. These are just within a reasonable time.

Q. After we have discussed this now, can you tell the Court to the best of your recollection what time it was you arrested him?

A. Well, according to the report, it was at 1:45.

Q. So that was after 1:30 and after you started the 520 form then?

A. Well, now, to refer to this 520 form, this is just a matter of practice that whenever we make an arrest of this [fol. 79] nature this form is filled out. Now, it doesn't necessarily mean that the examinations indicated on here were all performed.

Q. They were all performed after 1:30?

A. As you will notice on here, the majority of this was filled out from general demeanor, which is indicated in the report itself.

Q. You filled out the form after 1:30 P. M., is that correct, the 520 form?

A. Yes.

Q. It relates to matters inquired by you after 1:30 P. M. or A. M.? Excuse me.

A. I don't understand. It relates to?

Q. Well, the matters that you have related in the 520 form, the questions you asked the defendant relate to all matters which transpired after 1:30 P. M., is that correct?

A. No. No. No. Not at all.

Q. There were some things that were indicated therein you asked the defendant about prior to 1:30?

The Court: Now I don't understand. I take it all the questions were asked by you at a time commencing about 1:30 or after that. That is when you asked these questions that are set forth in the form 520, is that correct, sir? Or had you previously asked him some of these questions be-

fore 1:30? We are talking about two different things, but [fol. 80] I just want to separate the asking of the questions and what they relate to.

The Witness: Part of this form I see I didn't fill out. The top part was not made by me. That is not my writing. The part that starts down to the number 24, do you have a copy there?

Mr. McGurrin: Yes.

The Witness: Number 24, the question is, "Are you sick or injured?" The answer is, "Yes," which is my writing. Down to line 34, which is the third line up from the bottom. Now, everything in that particular space from line 24 to 34 are questions that I asked and the answers that are received.

By Mr. McGurrin:

Q. I am trying to find out first when were those questions asked by you?

A. Well, I see here in one of the questions is, "What time is it?" and the answer I received is "11:30," and at that time I looked at my watch, and it was 1:15.

Q. Now, at this time when you asked that question had you advised him of his constitutional rights?

A. I don't know.

Q. Well, do you remember at what stage it was with respect to the question list here from 24 to 34 that you advised him of his constitutional rights, or whether in fact you did during any of those questions?

[fol. 81] Mr. Pearman: Your Honor, I am going to have to object to going into this 520 form. These are approximate times. There is nothing on that 520 form that would require having constitutional rights, other than what time is it.

The Court: That may be. This is voir dire. It's in the absence of the jury. I'd like to give counsel liberality in making his record to support his objection. Ordinarily I have taken the position that the question in the 520, other

than the specific question with respect to consumption of alcoholic beverages, doesn't fall within the scope of attempting to elicit any incriminating admissions. I am subject to argument on that, but that one question generally I feel can have no other purpose. The others I have felt in the past are within the scope of the Dorado case.

Mr. Pearman: The People are willing to stipulate that they won't ask a question as to "What time is it?" or "Where are you?" The main objection as I saw on voir dire that we have here is whether the defendant in effect was able to understand the nature of the constitutional rights. The officer has testified that the defendant was coherent and did understand the questions.

Mr. McGurrin: He hasn't said either one of what you just got through saying.

[fol. 82] Mr. Pearman: The officer asked him if he understood this, and the defendant answered yes.

The Court: That is correct. That is what the testimony has elicited so far.

I will overrule the objection. You can continue.

The Witness: Could I have the question?

The Court: I think you answered the last one. I think there was an objection to the whole line of testimony, the whole line of voir dire, and I have overruled that.

By Mr. McGurrin:

Q. Officer, you indicated that previous to the time that you advised the defendant of his constitutional rights you had formed the opinion that he was under the influence of intoxicating liquor, is that correct?

A. Yes.

Q. So when you explained these constitutional rights to him, in your own mind you felt he was under the influence of intoxicating liquor?

A. Yes.

Q. But it would be fair to say that you didn't feel that the liquor had so affected his ability to comprehend that

he couldn't understand what you were explaining to him? Is that your position?

A. That is the position.

[fol. 83] Q. In other words, so far as you were concerned, he wasn't so intoxicated that he had lost his ability to understand what someone was telling him?

A. No, he was not.

Q. Do you personally draw any distinction between or among different states of intoxication, such as under the influence, intoxicated, or drunk?

A. Yes, I do.

Q. Which as far as you are concerned is the most extreme state of intoxication?

A. Well, unconscious is the most extreme.

Q. Then what would be the next for a person that is conscious? Would that be drunk?

A. Yes. Staggering, falling, unable to care for himself.

Q. What about intoxicated?

A. Well, intoxication to a lesser degree, when they are still able to stay on their feet and staggering and obviously deviating from the normal.

Q. What about under the influence in the category you placed the defendant in?

A. Well, to the point where they have thickness of speech, bloodshot eyes, glassy eyed appearance, unsteadiness. It's difficult to describe all the symptoms.

The Court: How about the affect on the person other than just the symptoms of a person who is under the in-[fol. 84] fluence? What is your impression of what affect it would have on the individual?

The Witness: You mean being under the influence, my impressions?

The Court: Yes.

The Witness: Well, that is my impression, that I would say he wouldn't necessarily have to have bloodshot eyes, that I would say that the eyes would have a somewhat glassy appearance.

The Court: No. I didn't make that a very good question. I want to know in your mind when you say somebody is under the influence, are you concerned only with the symptoms, or do you relate the symptoms to some other factor as far as the individual's ability?

The Witness: Yes. The odor of alcohol naturally has to be present, because I realize that there are other objective symptoms that would indicate, even an illness, but with the odor of alcohol present, and in conjunction with the other objective symptoms, is what I base my opinion on.

The Court: You can resume, Mr. McGurrin.

By Mr. McGurrin:

Q. Did you feel that, based upon your conversation with the defendant after you advised him of his constitutional rights, that he was in fact coherent?

A. (No response.)

[fol. 85] Q. Could he understand everything you told him?

A. I'm sure he did.

Q. Could you understand everything that Mr. Schmerber told you?

A. Yes. Yes.

Q. Then as far as you were concerned, your own personal conclusion was that he understood everything you had explained to him?

A. Yes. I'm sure he did.

Mr. McGurrin: Your Honor, I was thinking that I intend to object or, in other words, your Honor was going to stop when we went into the blood business, and I thought possibly I could just continue this over and take care of the whole thing at this time.

The Court: Yes. I assumed you were probably going to do that, frankly. I assumed that this whole line of testimony when you commenced was preliminary to the issue of the conversation, if any, about the blood sample being taken, so I would suggest we just go ahead and proceed. I take it you have finished your voir dire on this particular point.

Mr. McGurrin: Yes. Right.

The Court: I would think you could proceed with the rest of it. We will just let the jury remain outside until after we have ruled on the admissibility of the entire package, then.

[fol. 86] I am going to overrule the objection, at least assuming there is to be no further evidence presented. I feel at least at this stage of the evidence, one, I am not at all sure, especially in view of the People's indication that they don't intend to ask two questions as to where the defendant was and what time it was, and the Court's indication that it's not going to permit the inquiry as to how much the defendant had to drink inasmuch as there is no indication he was advised of his rights before that, in view of those facts, I don't think there is any showing, that there is anything in the field sobriety examination that would come within the scope of the Dorado case, so my present feeling is that the objection should be overruled as far as we have gone on this evidence.

Now, assuming you are not going to present anything else.

Mr. McGurrin: Yes.

The Court: Now you can go ahead and proceed with the foundation as to the blood sample.

Mr. Pearman: Your Honor, I would like to ask if the Court's ruling on this one point, the objection as I understand it was as to the conversation with the defendant after his constitutional rights had been administered.

The Court: Perhaps I misunderstood that, then. If that is the case, then I will overrule that objection.

[fol. 87] Mr. McGurrin: I object to any conversation with the defendant before or after. The officer has been completely inexplicit. I don't think anybody knows at this time when the defendant was arrested or when he was advised of his rights. The officer doesn't know, so I don't know how anyone in this courtroom can.

The Court: It depends on what the conversation is. This is the problem.

First, as far as any incriminating statements as such, there were none other than exculpatory statements, which were stated in the opening statement, so I don't think any of those were covered, whether or not the defendant was advised of his rights. That is one reason I haven't been concerned about Dorado so far as those are concerned. Insofar as the opening statement is concerned, all the defendant said, if that is what is going to be your offer of proof, is that there was somebody else and "I wasn't there," and "I was rolled some place," or words to that effect. I will overrule the objection as to that statement going in.

Secondly, as to statements elicited in response, if the People want to introduce them, in response to the defendant's physical condition, apart from questions as to what, if anything, the defendant had had to drink, or questions, perhaps, intended to cause him to admit that he didn't [fol. 88] know what time it was or where he was, I am not going to permit those. The People have indicated they are not going to ask the latter two, and I feel that that first statement is incriminating by its very nature and that there is no sufficient foundation laid as to the advice of counsel, so I won't permit that.

As to other items which may not be included in those, I will have to cover those as we get to them. That is why we were here with the jury outside. That is what I mean when I am saying I am generally overruling the objection. That is why I say it is not clear when the defendant was advised of his rights. If we are talking about statements which would be incriminating under the Dorado case and Stewart case, I would sustain the objection.

Mr. Pearman: May I say an additional word?

The Court: Yes, indeed.

Mr. Pearman: To make sure I have the Court's ruling correctly, then the things that I indicated in my opening statement about, "I have had nothing to drink," and "I

was rolled," these would be able to come in as conversation, is that correct?

The Court: No. They are not incriminating. They are exculpatory. Even the broadest case along the Dorado theory I have read admits those statements.

Mr. McGurrin: Counsel, I don't think you intentionally misstated it, but the defendant in that statement didn't say [fol. 89] "I didn't have anything to drink."

The Court: That was the Court's characterization of it. I don't know that there is a question pending right now, officer.

The Witness: I wanted to ask a question.

The Court: Go ahead. The jury is out.

The Witness: One of the things I wanted to ask about now, at the time that I first saw the defendant I had no idea which one of the two men was the driver. I had questioned the other passenger. I believe I talked to Mr. Schmerber first. Then I questioned the passenger, and the passenger, Mr. Eaker, informed me that Mr. Schmerber had been the driver. Now, this was the time when I made closer observations and made the arrest. See, I have no idea of knowing how long I spent with Mr. Eaker prior to that time.

The Court: That, of course, has come in in the absence of the jury, and, naturally, the accusation by Mr. Eaker, he made the same statement on the stand, but the extra-judicial statements are not admissible. Just for having the record clear, I will strike it.

Mr. McGurrin: I was going to follow it through.

The Court: If you want to, go ahead.

Mr. McGurrin: Because it goes to the reasonableness of the arrest.

[fol. 90] The Court: Go ahead if you want to do it.

Mr. McGurrin: Since the jury isn't here, it doesn't damage the case. May I then continue?

The Court: Yes. You may if you wish.

By Mr. McGurrin:

Q. You spoke to Mr. Eaker at Encino Hospital?

A. Yes. Both of them.

Q. With respect to driving, you spoke to Mr. Eaker first and asked him who was driving the car?

A. No. I talked to Mr. Schmerber first.

Q. And he said he wasn't driving the car?

A. Yes.

Q. Then you went to Mr. Eaker?

Mr. Pearman: I will have to object to this as improper voir dire. I don't think defense counsel should be able to get all his evidence he needs for cross examination in advance.

The Court: It's not before a jury. Technically it is erroneous. The officer quite properly thought that there was something he should tell us, but, technically speaking, I think it is in error.

I think for the record I will strike the testimony commencing with the officer's statement. I think we should proceed factually, to chronologically go ahead at this point about the blood.

Mr. McGurrin: May I say this, though?

[fol. 91] The Court: Yes, indeed.

Mr. McGurrin: I have a further contention—I don't think I have ever probably specifically raised it—and that is that the arrest was illegal, and since the arrest was illegal, therefore, the search was illegal, that is, the taking of the blood. That is the basis for asking your Honor not to strike that statement. Actually, I am helping the People prove their probable cause for the arrest, but I wanted to continue on that point.

The Court: All right. If that is your contention, I suppose I will let you go ahead with it.

I will vacate the order striking the testimony. It is understood that the only purpose at this point in so doing is to allow you to proceed with determining that the arrest was illegal and therefore any evidence elicited from the defendant was also illegal.

Mr. McGurrin: That is correct.

The Court: If that is your purpose, I think you have a right to go into it. Of course, you will have a right to put on evidence on the other side. I am not too concerned about the order in which it comes in without the jury.

Go ahead.

By Mr. McGurrin:

Q. The blood sample of Mr. Schmerber was taken at [fol. 92] 2:00 o'clock, is that correct?

A. (No response.)

Q. Refer to your report if that will help you, the arrest report on the first page.

A. If it says 2:00 o'clock, that is approximately the time it was taken, yes.

Q. Under "Chemical test," if you glance at it, maybe it will refresh your recollection.

A. Yes.

Q. Now, you had arrested the defendant previous to 2:00 o'clock then?

A. Yes.

Q. At the time you arrested him, of course, you didn't have a warrant for his arrest?

A. No.

Q. Or a warrant for the search of his person?

A. No.

Q. And no one else had any such warrant to your knowledge?

A. No.

Q. No, they did not?

A. No, they did not.

Q. You based the determination so far as who was driving the car upon your conversation with Mr. Eaker, is that correct?

A. That is correct.

[fol. 93] Q. Anyone else other than Mr. Eaker that you talked to which you utilized for the purpose of determining that Mr. Schmerber was the person that drove the car?

A. Yes.

Q. Who was that?

A. Mr. Yellin.

Q. Mr. Yellin?

A. Yes.

Q. He was at the scene?

A. Yes.

Q. What did he indicate to you with respect to where Mr. Schmerber was?

A. He indicated to me the position the two people were in at the time he arrived there.

Q. What did he indicate with respect to Mr. Schmerber specifically?

A. Well, he indicated that Mr. Schmerber was laying over—Mr. Eaker was down on the floorboard on the right-hand side, and Mr. Schmerber was laying over in a position that appeared to be on top of him.

Q. On top of Eaker?

A. On top of Eaker, yes.

Q. Was there anyone else other than yourself that you talked to with respect to determining whether or not the defendant was under the influence of an intoxicating liquor?

[fol. 94] A. (No response.)

Q. Do you understand? Was there any other person that you spoke to for the purpose of determining whether or not in fact at the time that the defendant was supposedly driving the car he was under the influence?

A. Other than me?

Q. Yes, sir.

A. Yes. I talked to Mr. Eaker.

Q. What did he say about intoxication of Mr. Schmerber?

A. Well, he said that he didn't think he was loaded or even a little bit loaded; otherwise he wouldn't have ridden with him.

Q. So there was nothing that he said which assisted you in forming an opinion so far as intoxication is concerned?

A. No.

Q. Anyone else?

A. I don't remember whether Mr. Yellin had anything to say about it or not.

Q. You arrested Mr. Schmerber for 23101, which is a felony, is that correct?

A. That is correct.

Q. The only thing that you were aware of by your observations at the scene with discussions with anyone with respect to making this case a felony was the fact that the car [fol. 95] was on the west side of the street, is that correct?

A. On the wrong side of the road.

Q. There was nothing at all that was visible at the location which could show you specifically that the car in fact had come over the line, because there were no skid marks, is that correct?

A. Well, specifically, to indicate that the car had been on the wrong side of the road, not over the double line, I have no way of knowing whether he went over the double line or whether he came in on the wrong side of the road, but, specifically, to indicate that he had been on the wrong side of the road is the direction in which the tree was knocked, the direction in which his car was facing, the location where the tire mark was on the curb where the car hit it.

Q. Brush marks?

A. Yes. These things indicated the direction of travel. At that time there was no question that the car was on the wrong side of the street.

Q. That was your conclusion after what you observed?

A. From observations and physical evidence, yes.

Q. When you asked the defendant to take a blood test, what did he say to you?

The Court: My only interruption here is I have let you [fol. 96] proceed on the issue of legality of the arrest and

probable cause. When you get to the blood test, actually the People haven't had the opportunity to lay any foundation for this. I think they should have the opportunity to do that, unless this is so closely interrelated.

Mr. McGurrin: No. I was just going to go ahead and finish it off with this and then quit.

The Court: Do you have any objection, Mr. Pearman? As I say, we are without the jury, so the order is really not vital.

Mr. Pearman: I would like to know how the defense is going to connect this up with the questions that he has been asking.

The Court: The questions that have been asked so far, I can save a little bit of time, I assume Mr. McGurrin is claiming that there was not reasonable cause to arrest.

Mr. McGurrin: Right.

The Court: Therefore, it was an unlawful arrest, and, therefore, the fruit of the tree is poison, and none of the evidence can come in until I have heard the questions on voir dire and the arguments that counsel wants to make. I suppose, if you don't mind, we can let him go ahead and finish off his questions, and then you can engage in whatever examination you feel is necessary, and we will deter-[fol. 97] mine all of these items in the absence of the jury and thereby I hope save considerable time.

Mr. McGurrin: I have only a few more on that line.

The Court: Go ahead.

By Mr. McGurrin:

Q. You asked the defendant for permission to take his blood, is that correct?

A. Yes.

Q. And what exactly did you say to him in that respect?

A. I asked him if he would have any objection to the taking of a blood sample.

Q. What did he say?

A. He said he did not.

Q. That was all he said at that time?

A. Yes.

Q. Then what next transpired?

A. Then I went and got the doctor.

Q. The doctor was gone obviously at that time that you asked him that question?

A. He wasn't in the room. I went and got the doctor and the nurse. Yes. I went and got the doctor and the nurse. When they came back and we got down to the business of actually taking the blood, then he said—

Q. What stage is that? When you say that, what do you [fol. 98] mean?

A. The doctor got the needle out and got everything prepared and got out this little glass vial that they put the sample into. At this point the defendant objected to us taking his blood.

Q. What did he say?

A. He said that he didn't think he should do it, because his attorney had advised him not to. I don't know the exact wording he used. In essence he had been advised by an attorney not to submit to such examinations.

Q. Anything else that he said at that time when he objected?

A. He said he wouldn't fight it.

Q. Were those his exact words?

A. I believe his exact words were he wouldn't fight us taking it, because I had told him that even if we took his blood, that I would indicate into the report the manner in which it was taken, that I would indicate in my report that he had objected and had not used any physical force in his objection.

Q. His physical condition at that time, was he still bleeding or had he been sewed up?

A. I don't know whether he had been sewed up, but he was bandaged.

Q. Had he complained about his leg prior to the time of the blood incident?

[fol. 99] A. Yes. His ankle.

Q. His ankle. He said it was painful to him?

A. Well, I don't know if he used the word "painful." He said his ankle hurt.

Q. Then who, if anyone, was holding the defendant at the time the blood was extracted?

A. Who was holding him?

Q. Yes. Was anyone holding him?

A. No. Certainly not. He submitted voluntarily.

Q. He was sitting there by himself?

A. He was sitting there by himself. Nobody had to hold him. He didn't fight at all.

Q. He didn't fight at all?

A. No. He offered no objection.

The Court: The defendant's legal objection is noted in the arrest report. It is certainly not a consent. Of course, the People are not contending consent.

Mr. McGurrin: I don't think the officer meant it that way when he said it that way.

Q. In other words, the doctor physically extracted the blood from the defendant?

A. Yes.

Q. Did you tell the doctor to extract the blood from the defendant?

A. On the advice of my Sergeant, yes.

Q. That is Sergeant Smith?

[fol. 100] A. Yes.

Q. Where was Sergeant Smith?

A. He was there.

Q. He was in there in the same room?

A. Yes. I believe he was.

Q. When did you ask him, when all this was transpiring and all was going on at the same time? In other words, you said, "Well, should I take it or shouldn't I take it?"

A. When Mr. Schmerber objected, I went out of the room and told the Sergeant that he was objecting and that he

had been arrested on a felony charge and that I wanted a sample of his blood. The Sergeant advised or told the doctor to take a sample.

Q. You mean the Sergeant told the doctor that, not you?

A. The Sergeant told the doctor to take a sample.

The Court: In your presence?

The Witness: In my presence, yes.

By Mr. McGurrin:

Q. At this time you had told the defendant that he had a right to counsel, is that correct?

A. Before that I told him.

Q. Before that time, and that any statement he made at that time could be used against him, is that correct?

[fol. 101] A. That is right.

Q. And he didn't have to make any statement?

A. That is right.

Mr. McGurrin: I have nothing further.

The Court: Go ahead, Mr. Pearman.

Mr. Pearman: I have no questions at all.

The Court: I will hear argument on these points, then. Go ahead.

Mr. McGurrin: I have already for the record made the specific reason for my objections originally at the commencement of the case in my motion for suppression.

In addition to those, I'd like to reassert them at this time. In addition to those I'd like to argue that there was no probable cause for an arrest on a felony charge at this time; that there is not sufficient evidence under the law to establish the commission of a felony; that is, the commission of some other act which was the proximate cause of the injuries in this case; that, therefore, the arrest of the officer was illegal, because you can't arrest for a misdemeanor unless it is committed in your presence, which it obviously wasn't in this case; that since the arrest was illegal, the search was illegal; that is, the search with respect to the taking of the blood sample irrespective of

any other objections I have; that the search is illegal, and [fol. 102] there are cases which have held that where the blood sample is taken, where there either is an illegal arrest or a non-existent arrest, that the blood sample is in fact inadmissible. Of course, depending on how your Honor rules on the probable cause, I could give you the citations. If you hold against me, there is no need to give you the citations. If you are inclined to agree it was an illegal arrest for a felony, I could give you the citations which I have.

The Court: I will hear from the People first. I have some ideas. Let me hear him on this point first. Then we will proceed if necessary.

Mr. Pearman: I think your Honor has preliminarily ruled on this search and seizure part. I think the point he is raising here is probable cause.

The Court: That is what I want to hear about.

Mr. Pearman: Yes. The cases I think state that even though an arrest may be illegal, it doesn't bar criminal prosecution, and also an officer can arrest for a crime not committed in his presence if there is any justifiable ground at all to arrest the defendant. Here he could have probably arrested him for 647f or driving on the wrong side of the street or any number of grounds.

The Court: It's not in his presence. If that were the case, you see, there are two factors, and if those were the arguments, I think I would sustain the objection. Here [fol. 103] this was not a misdemeanor committed in the officer's presence, you see. If someone hadn't been injured, there would be an unlawful arrest, and I think I'd have to sustain the objection to the introduction of the evidence. He was arrested, however, for 23101. That is a felony, and under 836, Subdivision 3, the officer can arrest if he has reasonable cause to believe that the defendant has committed a felony whether or not it's committed.

So there are three elements to that felony: First, driving under the influence; second, bodily injury to some person; —I may be stating this in not precise terms of the statute

—and, third, the violation of some duty imposed by law.

I think those elements are present, but I just want to be sure.

The reasonable ground or the reasonable cause is the same sort of probable cause we talked about in a preliminary hearing, sufficient evidence to raise a strong suspicion in the mind of a reasonable man. I think that is it. If that is the case, one, there is evidence, even though the co-passenger or whatever he was, the co-inhabitant of the automobile didn't think that the defendant was loaded or under the influence. There is evidence from the officer's own testimony, which at least is enough to create a strong suspicion, I think enough to hold him in a preliminary, and I think [fol. 104] enough to constitute reasonable cause as to that element.

There is evidence that the defendant was driving. The statements of the co-inhabitant of the car—and this, of course, is at the time that the officer saw it, not the evidence that has been presented—subsequently the evidence of Mr. Davidson, which places him clearly behind the wheel immediately after the accident, but at that time evidence of the other person in the car and evidence of Mr. Yellin that at least the defendant was perhaps closer to the wheel than the other party.

As far as the last element, that is the one I have the most doubt about, but, at the same time, I think when a person is found headed in the opposite direction from the nearest lane of travel on a public highway against a tree —there are other possible hypotheses, but we are not concerned about reasonable doubt at this time. There might very well be a reasonable doubt that the defendant had been driving on the wrong side or had been driving recklessly of erratically or gone over the double line, but that is not what we are talking about—it seems to me that at that time there was a strong suspicion that the defendant was in violation of 23101. That being the case, I think the officer had reasonable ground to arrest on suspicion of commission of a felony. That being the case, I proceed to the next question.

Is there going to be any further argument other than [fol. 105] what is already made? If so, I will consider that.

Mr. McGurrin: I wanted to say one thing. I certainly agree there could be no question that the officer had probable cause so far as intoxication is concerned, as far as the driving is concerned, but I think the point is this that I am trying to make, your Honor, that with respect to the commission of a violation of another Section of the Vehicle Code, not only does there have to be that, but there has to be probable cause to believe that that was the proximate cause of the injuries. I am just saying intoxication, the defendant driver and another violation, that isn't the law. You have to add a fourth element: Proximate causation.

The Court: Yes, of course.

Mr. McGurrin: That is my position, your Honor, that I didn't believe that the evidence which was presented at that time as well as now indicates in any way that that was the proximate cause of the injury.

The Court: So far as proving beyond a reasonable doubt, this is why you are here. You are certainly right as to the proximate cause. That is the reason I say I have some doubt. Well, I will modify that.

I have very little doubt that if in fact the operator of this motor vehicle was in violation of the Vehicle Code Section, such as driving at an excessive rate of speed or driving on the wrong side or reckless driving, that that was [fol. 106] the proximate cause of the bodily injury both to the defendant and the other party. I think we just have to look at the inference and determine whether it's a reasonable inference enough to create a strong suspicion. In the normal course of human events cars just don't suddenly appear off a public highway through a tree on private property without having been driven there, and they don't appear there without having been driven there in an unusual manner. I mean there are other possible causes, but all we are concerned about is the matter of the suspicion. So it seems to me that there was a reasonable ground at that time from the officer's standpoint in concluding that the

elements of the 23101, including the proximate causation, were present. Whether it could be proved beyond a reasonable doubt, of course, is another matter, but as far as the reasonable ground to arrest, I think it was present.

Mr. McGurrin: All right, your Honor. Then there was one further thing I forget to mention.

The Court: Go ahead.

Mr. McGurrin: That was that then I would object to the introduction of the blood sample on the ground that it is specifically contrary to Escobido and Dorado and Stewart, because the defendant, according to the officer, specifically tells him in effect on advice of counsel he refuses to take [fol. 107] the test, and then they go ahead and take the test.

The Court: That is where you are going to get a reversal if the defendant is convicted. But I am bound by Duronceloy. I think you have made your record and argument and made them both very well.

It seems to me under the law that it is still the law of this state, the Duronceloy case, it's as close as you could find a case at least in the Appellate cases, and it is a Supreme Court case, and there although there was an objection and some physical resistance, the Court held, being a lawful arrest, it was a lawful search or seizure, and I think I am bound by that at this level. There are, as you know, later DCA cases which are similar. There is the Huber case, although the defendant was unconscious. It may very well be when it gets up to the Supreme Court, Dorado et al will be extended, but I can't do it.

I think under the circumstances it was a lawful search and seizure. I don't think it was a testimonial sort of compulsion. I think the evidence of the blood sample on the basis of the record that we now have is admissible. I think you have properly made your record as to all three items, and I will overrule the objection on those grounds.

Mr. McGurrin: Thank you, your Honor.

The Court: I think that is probably the conclusion of the [fol. 108] testimony, so, in order to give the reporter and counsel and everybody else a rest, we will adjourn until

or recess until 11:00 o'clock, and we will ask the jury to be brought in at that time.

(Short recess.)

The Court: The record will indicate the jury are all present, the defendant is present.

Ladies and gentlemen of the jury, as we indicated sometime ago and considerably longer than I realized it would be, we took a recess on points of law. It was strictly legal matters with which you are not to be concerned. The Court has made certain rulings as to the admissibility of evidence, and now the People can proceed.

Mr. Pearman: Thank you, your Honor.

I'd like to have the question read back just before we adjourned.

(The question was read by the reporter.)

The Court: I ruled on that question in the absence of the jury, and that particular question for the purposes of the jury will be deemed withdrawn. You can reframe another question. I think in view of the conversation, the discussion and testimony in the absence of the jury, that particular question is no longer appropriate as worded in that form.

[fol. 109] Direct examination (continued).

By Mr. Pearman:

Q. Did you have a conversation with the defendant after you informed him of his constitutional rights?

A. Yes.

Q. Who was present when this conversation took place to the best of your recollection?

A. Well, to the best of my recollection, just the defendant and myself.

Q. Did you ask the defendant if he had been driving the vehicle in question on this particular evening?

A. Yes.

Q. What was his answer?

A. He said he had not been.

Q. Did you ask the defendant if he had been involved in a traffic accident?

A. Yes.

Q. What was his response?

A. He stated he didn't know anything about a traffic accident; he had not been involved in one.

Q. Did he state how he received his injuries?

A. Yes.

Q. What did he say?

A. He said that he had been picked up by some guys while he was hitchhiking, and they must have beat him up in an alley some place.

[fol. 110] Q. Now, officer, did you ask the defendant if he would like to take any type of a test at this time?

A. Yes.

Q. What test was that?

A. Well, at first I asked him if he would take a breathalyzer test.

Q. What was his response?

A. He didn't want to take the breathalyzer test.

Q. Did you ask him if he'd like to take any other type of test?

A. Yes.

Q. What test was that?

A. I asked him if he would submit to a blood sample being withdrawn from him.

Q. What did he state to that?

A. He said he would.

Q. Then what was the next thing that you did after he stated he would take this test?

A. Well, at that time I got a hold of a doctor and the nurse, and the doctor came into the room and made the necessary preparations, got the syringe and needle and a glass vial, and he was approaching the defendant. At this time the defendant objected to the withdrawing of the blood.

Q. Then what was the next thing that happened after that?

[fol. 111] A. At that time I went back out in the hall and got my supervisor, Sergeant Smith, and informed him—

Mr. McGurrin: I object to what he informed him as hearsay.

The Court: Yes. Just tell us what transpired. I assume you—well, maybe I shouldn't assume. I assume you took some action after you had a conversation with Sergeant Smith?

The Witness: Yes.

The Court: Would you relate what the action and the conversations were that took place in the presence of the defendant?

The Witness: I went out and got the Sergeant and brought him back into the room. In the presence of the defendant I told the Sergeant that he had refused a blood sample, and then the Sergeant spoke to him, and then the Sergeant advised me to go ahead and get the blood sample.

By Mr. Pearman:

Q. Who procured the blood sample, officer?

A. The blood sample was taken from the defendant by a Dr. Brooks.

Q. Were you present when this sample was taken?

A. Yes, I was.

Q. Then after the sample was taken by Dr. Brooks, what was the next thing that you did?

[fol. 112] A. The sample was labelled in my presence, and the sample was taken from the defendant. The needle is put into a rubber cork in the top of a little glass vial. The blood is put into the glass vial. Then it's lebelled, the name and the charge. I don't know exactly what all goes on the particular label. I believe my name is on it, either my name or initials are on it. Then I retained this glass vial myself.

Q. Was this glass vial put in any type of package or anything?

A. Not at that time, no.

Q. Where did you put this glass vial?

A. In my shirt pocket.

Q. Approximately what time was this?

A. This was about 2:00 A. M.

Q. Now, what time was the last vial taken to the West Valley Station?

A. It was taken there when we took the defendant to the station.

Q. Approximately what time was that?

A. It was after 2:00 o'clock. I don't recall the exact time.

Q. Did you have this blood sample on you until the time it was booked at the West Valley Station?

A. Yes, I did.

Mr. Pearman: May we approach the bench, your Honor? [fol. 113] The Court: Yes.

(Discussion at the bench between the Court and counsel, as follows:)

Mr. Pearman: We had a stipulation that I think we entered into earlier that the blood sample was taken by Dr. Brooks under standard medical procedures.

Mr. McGurrin: Yes. I will stipulate in open court.

The Court: I will simply state it as an agreement. I will state it in those terms.

(End of discussion at the bench.)

The Court: Ladies and gentlemen, there is a stipulation, which later on the Court will instruct you will have the same effect as any testimony from the stand, which counsel have entered into. As I understand it, the stipulation is that the certain blood sample was taken from the veins of the defendant by a Dr. Brooks under standard medical procedures at the Encino Hospital.

Is that a correct statement?

Mr. McGurrin: That is correct.

Mr. Pearman: Yes, your Honor.

The Court: Very well. That is a stipulation, ladies and gentlemen, that will have the same effect as any testimony given from the stand.

Continue.

[fol. 114] By Mr. Pearman:

Q. Now, officer, where was the blood sample put when it was taken to the West Valley Station? What did you do with it?

A. I took it out of my shirt, and I put it into a small envelope. I believe we call it a coin envelope. It's about a two by three or two by four envelope. Then I put that envelope inside a large envelope on the outside of which is a long series of questions, such as name, charge, booking number, numerous items that are required on this particular envelope. I couldn't name everything that is on it at the moment.

I sealed this envelope with sealing wax, and I took it to the desk at the police station and put it into a drawer and locked the drawer.

Q. Now, earlier when you had arrived at the scene of the accident you stated that you made some investigation?

A. Yes.

Q. Now would you please tell the jury and the Court the investigation you made at this time?

Mr. McGurrin: I will object to the form of the question. Were you finished?

Mr. Pearman: Yes.

Mr. McGurrin: I object to the form of the question on the grounds it is ambiguous and immaterial and gives rise [fol. 115] to the officer testifying to things which would be hearsay and incompetent and immaterial. It would be immaterial so far as what his investigation was at the scene after the defendant was in the ambulance.

The Court: I had better see you at the bench.

(Discussion at the bench between the Court and counsel, as follows:)

The Court: What is the purpose of this line of testimony?

Mr. Pearman: I tried to put the testimony in order. At that time you said it should be given later.

The Court: Not this testimony. Perhaps I didn't explain myself. What is the purpose? What is your offer of proof?

Mr. Pearman: The offer of proof I think in any drunk driving case is the manner in which the defendant drove or where his car was would be material. In other words, which way it was going and the tree and impact and the condition of the car. These are all things that the officer would be qualified to testify.

The Court: Are you going to qualify this officer as an accident investigation officer?

Mr. Pearman: No. I wasn't going to attempt to have him draw any conclusions. Just state the physical facts as he saw them. In other words, if the tree was knocked down. [fol. 116] Mr. McGurrin: I don't object to it. It's the way he asked the question. He gave him a Pandora's box to say anything he wanted to. I wouldn't object if he said, "Where was the tree, where was the car?" That I don't object to. It's the way he asked it.

The Court: Why don't you direct the specific items that you wanted to have him answer. I was confused myself. I thought you were going to have him reconstruct the scene of the impact and speed and so forth. You haven't qualified him as an A.I.D. officer to be able to do that. If you want to ask him the specific physical items from which the jury can draw their own inferences, and you can argue the matter, counsel is not going to object. I will permit you to do that.

(End of discussion at the bench.)

By Mr. Pearman:

Q. Officer, when you arrived at the scene of the accident, did you make an investigation?

A. Yes.

Q. Would you please show the jury the direction in which the car was pointed upon your arrival at the accident scene?

Mr. McGurrin: I believe he has already testified to that. He has indicated it on the diagram on the blackboard.

The Court: Yes. That is S-1 which you placed there, [fol. 117] isn't it, officer?

The Witness: Yes.

The Court: Just for the record, you are showing a little inverted V, which is pointed in a northerly direction. I assume that is the direction in which the car was pointed?

The Witness: That is correct.

By Mr. Pearman:

Q. Did you ascertain any tire marks or any skid marks or anything of that nature?

A. Yes.

Q. Would you please show the jury where you saw these marks?

The Court: If you are able to mark those on the diagram, certainly you may do that, officer.

The Witness: Just on the curb area approximately in this location there was a brush tire mark.

The Court: Do you want to mark that S-3?

The Witness: (Marking.) Well, I will stop there. Indicating a fresh tire mark at this approximate location.

By Mr. Pearman:

Q. You have indicated a fence on the map, is that correct?

A. Yes.

Q. Did the vehicle hit this fence?

[fol. 118] A. Yes, it did.

Q. Could you tell the jury where the debris of the fence, whether it was north or south of the fenceline?

A. The fence was laid over to the north. It's a chain link fence.

Q. Could you tell the jury the direction in which the tree was laid over?

A. Yes. The tree was also bent over toward the north.

Mr. Pearman: I have nothing further.

The Court: You may cross-examine, Mr. McGurrin.

Cross examination.

By Mr. McGurrin:

Q. When you arrived at the scene, Mr. Eaker was in the ambulance already?

A. Yes.

Q. And Mr. Schmerber was in the process of being placed into the ambulance?

A. Yes.

Q. Was he in an erect position or in a prone position?

A. Erect.

Q. He was standing?

A. Yes.

[fol. 119] Q. This was approximately what time?

A. As I recall, we arrived at the scene about 12:20, and it was approximately at that time.

Q. When was the next time you saw Mr. Schmerber?

A. At the hospital.

Q. What time was that?

A. Sometime around 1:00 o'clock.

Q. When you talked to him there?

A. Yes.

Q. When you first observed him, you indicated that his face was bloody, is that correct.

A. Yes.

Q. How about his clothing?

A. Bloody.

Q. Can you describe what portion of the clothing was bloody?

A. The front of his shirt was bloody and torn.

Q. What about the color of his face other than the blood or was the blood covering the entire portion of his face?

A. No.

Q. Where was the blood?

A. Largely it was, but not the entire face.

Q. Was there some point on the face above which there was no blood to the best of your recollection when you observed him at the scene?

[fol. 120] A. Was there some point on his face that was not bloody?

Q. Yes, sir.

A. Yes.

Q. Where was that?

A. I don't know.

Q. You just have an impression that there was?

A. Yes.

Q. When you observed him, could you actually observe that blood was coming from a wound or wounds? Was there a flowing of the blood? Was it fresh blood or was it caked blood?

A. It was fresh.

Q. Did you observe any caked blood of any type, either on his face or on his clothing?

A. Not that I recall.

Q. Did you check the interior of the car, to ascertain whether or not there was any blood, in any portion of the interior of the car?

A. I recall seeing some in the front part on the floorboard, on the seat.

Q. Did you or anyone under your direction or to your knowledge ever run a fingerprint analysis on the steering wheel of the car?

A. Of this particular car?

Q. Of this particular car that was at this location of [fol. 121] S-2.

A. No. To my knowledge, no one ever has.

Q. Or any other portion of the car?

A. Not to my knowledge.

Q. Now, did you say that you smelled alcohol on the breath of the defendant at the scene or at the hospital?

A. At the scene.

Q. How close were you to him at that time that you noticed the odor of alcohol?

A. Right beside him.

Q. Would that be a foot away or immediately touching his person?

A. In specific distances, I couldn't say. I was close enough to smell it. That is the best I could do.

Q. You indicated his eyes were bloodshot and watery, is that correct?

A. Yes.

Q. And had a glassy appearance?

A. Yes.

Q. Did you notice whether or not there was any blood in the eye or eyelid area of the defendant at the scene?

A. Not specifically. I know it was pretty bloody, but specifically in his eyes or anything of that nature, I couldn't say positively.

[fol. 122] Q. He did have blood above the eyebrow area at the scene, is that not correct, officer?

A. Yes. I'm sure he did.

Q. And he had blood below the nose?

A. Yes.

Q. And on the chin or chin area?

A. Yes.

Q. Now, at the scene did you talk to a Mr. Yellin?

A. Yes.

Q. Did he make a statement to you as to what he observed?

A. Yes.

Q. Did you talk to the gentleman Mr. Bruce Davidson, who testified here yesterday?

A. I believe just enough to obtain his name and address.

Q. You just got his name. In other words, he didn't make any statement to you as to what he observed that particular morning or evening, is that correct?

A. I don't recall that he did.

Q. But Mr. Yellin did?

A. Yes.

Q. Do you know where Mr. Yellin lives?

A. Do I know where he lives?

Q. Yes.

A. I believe he lives in the house that is indicated there [fol. 123] at right near S-1.

Q. The one that would be north of the fence?

A. The one that is marked house. I believe that is it.

Q. North of the fence there?

A. Yes. I believe that is Mr. Yellin's residence.

Q. You say the defendant when he spoke to you at the hospital spoke slowly, is that correct?

A. Yes.

Q. Was there any time that you ever heard him before this particular occasion when you spoke to him at the hospital?

A. No.

Q. So you do not know whether or not he normally speaks in a slow fashion or whether he speaks rapidly?

A. No.

Q. I believe you indicated his speech was slightly slurred, is that correct?

A. Yes.

Q. But you understood all of the answers he gave you to any questions you asked him, is that correct?

A. Yes.

Q. When you spoke to him, could you tell the Court and the jury what the condition of his upper lip was?

A. Yes.

[fol. 124] Q. What was that?

A. He had a cut.

Q. Did you notice whether or not the lip was swollen?

A. Yes.

Q. Did you observe any suturing or stitches being placed in the lip area between the nose and the upper lip?

A. Yes.

Q. Approximately what time was it that that took place to the best of your recollection?

A. I don't remember.

Q. You indicated, I believe earlier this morning, that the defendant's speech was slightly slurred, is that correct?

A. Yes.

Q. Do you as an officer consider slurred and thick as analogous or the same?

A. Generally, yes.

Q. So that if you said thick, it means to you the same thing as slurred?

A. Yes.

Q. At the time that you originally investigated this matter, you felt that his speech was thick, is that correct?

A. Well, I said that I thought his speech was slightly slurred.

[fol. 125] Q. Well, what I am asking you, officer, isn't it a fact in your report so far as this matter is concerned that you indicated his speech was thick, that you didn't indicate anywhere that his speech was slurred? Isn't that true?

A. Yes.

Q. When you formed your opinion that the defendant was under the influence of intoxicating liquor, that was based upon the observations you have indicated to the Court and the jury in your testimony today, is that correct?

A. Yes.

Q. When you formed the opinion that Mr. Schmerber was under the influence of intoxicating liquor, you didn't feel that he was drunk, is that correct?

A. That is right.

Q. And you didn't feel that he was intoxicated, is that correct?

A. Well, no, I wouldn't say that.

Q. Well, didn't you testify out of the presence of the jury that in your opinion he was not intoxicated, that he was just under the influence?

A. Well, I believe intoxication and under the influence are part of it. Intoxication is part of being under the influence.

Q. Officer, just a little while ago, sometime during this morning between 9:30 and now, didn't you testify that so [fol. 126] far as you were concerned there were three cate-

gories, drunk, intoxicated, and under the influence, and that the defendant fell within the category of under the influence?

A. I said that in my opinion he was under the influence.

Q. Would you answer the question?

A. Yes.

Q. You didn't testify, then, that he was intoxicated? You said he wasn't; he was just under the influence?

A. No. I didn't say he wasn't intoxicated.

Q. You don't recall that?

A. I did not say it.

Q. Is it your testimony now that when the jury was outside that you testified that the defendant was intoxicated? Is that your testimony now?

A. No.

Q. At the hospital did the defendant complain of any pain in your presence?

A. Yes.

Q. What areas did he complain of?

A. He said his ankle hurt.

Q. What else? Anything else?

A. No.

Q. As far as you were concerned from what you ob- [fol. 127] served and from what you could determine, he had a sprained ankle, is that right?

A. I don't know whether he had a sprained ankle.

Q. Did anyone put a cast on it in the hospital there?

A. No.

Q. Do you know whether in fact at some subsequent time a cast was placed on his leg?

A. No.

Q. Did you have anything to do with transporting him to the General Hospital?

A. No.

Q. When he was taken from the Encino Hospital to the jail, did you carry him, did he walk by himself, or was he taken in a stretcher or wheel chair, or what was the means

of transportation from the Encino Hospital to whatever transportation took him to the jail?

A. I believe I wheeled him out to the car in a wheel chair.

Q. Now, is that the best of your recollection?

A. As far as I can recall.

Q. Do you recall when you say you wheeled him out whether or not Dr. Brooks was there at that time?

A. No, I don't.

Q. Who was there when you wheeled him out other than yourself and Mr. Schmerber?

[fol. 128] A. I believe my partner was there.

Q. That is Officer Buell?

A. Yes.

Q. Other than the alcoholic odor on Mr. Schmerber's breath, the fact his speech was thick, his eyes were bloodshot and watery, there were no other objective symptoms that you observed to enable you to form an opinion as to his condition of sobriety, was there, officer?

A. I missed the first part of your question. I'm sorry.

(The question was read by the reporter.)

The Witness: Yes, there was.

By Mr. McGurrin:

Q. Would you look at your arrest report and your objective symptoms, officer, please?

A. (Examining document.) Yes.

Q. Did you prepare this report?

A. Yes.

Q. Isn't it indicated there that there were no other objective symptoms other than the ones I indicated and additionally pupils were dilated? Isn't that what you say specifically in there?

A. Yes.

Q. Where was it that you observed that the pupils were dilated?

A. At the hospital.

[fol. 129] Q. Did you ask the doctor to conduct an examination of the pupilary reaction to determine whether or not there was a dilation of it or contraction in fact?

A. No.

Q. Was one in fact conducted by Dr. Brooks?

A. I do not know.

Q. Of course, you don't know anything at all with respect to the pupilary reaction of this defendant? Isn't that correct?

A. (No response.)

Q. You don't know anything about the size of his pupils, how many centimeters they are, or whether large or dilated?

A. No.

Q. You never saw them before in your life?

A. No.

Q. Was he cooperative, officer?

A. Yes.

Q. So far as you were concerned, he answered your questions intelligently?

A. Generally speaking, yes.

Q. You spoke to Mr. Eaker at the Encino Hospital on the morning of November 14th?

A. Yes.

Q. You spoke to Mr. Schmerber the same way?

A. Yes.

[fol. 130] Q. Did Mr. Eaker make the statement to you that Mr. Schmerber picked him up and was taking him home?

A. Yes.

Q. Did Mr. Eaker also tell you that he couldn't give you a local address because he was in the process of moving?

A. Yes.

Q. At this particular location where you observed the car in the fashion you have indicated on the diagram there were no skid marks on Mecca Avenue, is that correct?

A. Just at that point I have indicated.

Q. That is not a skid mark, is it, officer? That is a brush mark?

A. Yes.

Q. So that there were no skid marks on Mecca Avenue?

A. Not what you'd call skid marks, no.

Q. This particular area on that particular morning there was no artificial lighting at all? Is that not correct?

A. That is correct.

Q. There was no moon that evening either, was there?

A. I don't know, but I know it was very dark.

Q. Do you recall the nature of the seat in the front seat [fol. 131] of that car, officer, whether it was a solid seat or whether it was split down the middle, the type that moves forward when you open the front door, you can throw the seat forward and go in that way?

A. No. I don't remember that.

Mr. McGurrin: I have some photographs, your Honor, which I would request be marked defendant's A, B, C, D, and E.

The Court: Yes. They may be so marked for identification.

Mr. McGurrin: I will show them to the People.

Q. Officer, I will show you defendant's A through E, the photographs, and ask you if you would be so kind as to just look at them for a moment.

A. Yes.

Q. To the best of your recollection, do those photographs accurately depict the car that was located at that particular location on the diagram indicated S-1?

A. It looks like it.

Q. In other words, to the best of your recollection anyway, is that correct?

A. Yes.

Q. In other words, the photographs are taken, of course, at a different location, but the car is basically the same?

[fol. 132] A. Yes. The damage and so forth, it appears to be the same car. Yes.

Q. Did you at any time ever check the back seat of the car to determine whether there was any blood on the back seat?

A. Not specifically for blood, no.

Q. What time was it, officer, that you indicated you placed the defendant under arrest?

A. About 1:45 A. M.

Q. When you first saw the defendant in the hospital, was he being treated at that time?

A. No, I don't believe he was.

Q. Was he lying down or sitting up or standing?

A. When I first saw him, he was lying down.

Q. This was in some type of treatment room?

A. Yes.

Mr. McGurrin: I have nothing further.

The Court: Any redirect?

Mr. Pearman: Nothing further, your Honor.

The Court: Very well.

You may step down, officer.

Do the People have anything else ready at this time?

Mr. Pearman: Officer Buell, your Honor.

The Court: Very well.

In view of the fact that we are going to have a little delay [fol. 133] in our afternoon session, we might as well commence the testimony of the officer now.

This officer is the investigating officer. I imagine he may remain.

THOMAS E. BUELL was called as a witness by and on behalf of the People, and having first been duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, sir?
The Witness: Thomas E. Buell. B-u-e-l-l.

Direct examination.

By Mr. Pearman:

Q. Officer Buell, are you a police officer of the city of Los Angeles?
A. I am.
Q. How long have you been so employed?
A. Sixteen and a half years.
Q. Now, on November 14, 1964, at approximately 12:00 o'clock were you working in conjunction with Officer Slattery?
A. I was.
Q. Did you receive a radio call at this time?
A. We did.
Q. Where did you go after receiving this radio call?
[fol. 134] A. To the 5200 block Mecca Avenue.
Q. What was your position in the police vehicle?
A. I was a passenger officer.
Q. Upon arriving at Mecca, what was the first thing that you observed?
A. I observed a fire department ambulance.
Q. Did you observe a vehicle which had been involved in an automobile accident?
A. I did.
Q. Directing your attention to the diagram S-1, would this be approximately where the vehicle was at this time?
A. Yes.
Q. Now, did you perform an investigation at the scene of the accident?
A. I did.

Q. Did you determine any skid marks or anything of that sort?

A. I believe there was a brush mark on the curbing.

Q. Would you say that S-3 would indicate approximately where that mark was?

A. Yes.

Q. Did you observe the position of the vehicle that had been involved in the accident?

[fol. 135] A. I did.

Q. Which direction was the automobile facing?

A. Approximately northbound.

Q. Did you observe a tree marked on the diagram as D-2 in red there?

A. Yes.

Q. Had the tree fallen over? Had it been knocked over?

A. It had.

Q. Which direction was the tree laying? Was it laying to the north or to the south?

A. I would say more or less to the north.

Q. Did you notice a fence which had been damaged?

A. I did.

Q. Which way was the fence damaged? Was it laying to the north or to the south of the line marked fence on the diagram?

A. I would say it was laying toward the north.

Q. Now, as you arrived at the accident, did you observe the defendant, seated on my extreme left?

A. Not at that time.

Q. Where did you first observe the defendant?

A. In the hospital.

Q. Did you see him at any time before arriving at the hospital?

A. Not that I recall.

[fol. 136] Q. Did you see the other person, Mr. Eaker? Did you see him at any time before the hospital?

A. I don't recall seeing him.

Q. Upon arriving at the scene of the accident, what were your duties until the time that you left for the hospital?

A. To investigate an accident that occurred there.

Q. You as such, did you perform most of the investigation work?

A. Yes. I measured.

Q. Other than the things that we have indicated in your investigation, were there any additional things that you investigated, tire marks, skid marks, things of that sort?

A. I looked for them, yes.

Q. Did you find any skid marks or any tire marks or anything other than the brush marks which you indicated?

A. I did not.

Q. Directing your attention to the diagram again and the island that is indicated in the center, did you observe that island at any time?

A. I did.

Q. Did you notice anything about the island that might indicate that there had been an accident or somebody crossing over the island?

A. I did not.

[fol. 137] Q. Did you notice a sign on the northernmost tip of the island?

A. No, I did not.

Q. Did you at any time actually walk down and look at the island itself?

A. I walked in that general direction, but I don't particularly remember looking at the island.

Q. Upon arriving at the Encino Hospital, did you observe the defendant at this time?

A. I did.

Q. Where did you observe the defendant?

A. In what I would term the operating room.

Q. At this time had any medical treatment been applied to the defendant?

Mr. McGurrin: Well, the question would call for a conclusion based upon hearsay.

The Court: I sustain the objection. If he knows of his own knowledge, he can answer, but the objection will be sustained.

Mr. Pearman: I will rephrase my question.

Q. Did you observe any bandages about the defendant or any stitches or anything of this nature?

A. I believe he had a bandage on his nose, but I am not sure.

Q. Now, did you talk to the defendant at this time?

[fol. 138] A. No, I didn't.

Q. Were you in the presence of the defendant when he had a conversation with your fellow officer, Officer Slattery?

A. No, I wasn't.

Q. Did you at any time come into close contact with the defendant? Did you get near the defendant?

A. I did.

Q. Was he laying down or sitting up or what was his position?

A. He was laying down.

Q. Was there anybody else present at the time you observed the defendant?

A. I believe my partner was in and out.

Q. Did you talk with the defendant yourself?

A. I don't recall talking to him.

Q. Did you have a chance to observe the defendant's eyes?

A. I did.

Q. Will you tell the Court what you observed about the defendant's eyes?

A. They seemed to be bloodshot and watery.

Q. Did you smell any alcohol on the defendant's person?

A. I smelled an alcoholic beverage on his person.

Q. You at no time had any conversation with the de-

[fol. 139] fendant?

Mr. McGurrin: Asked and answered two times, your Honor. I think the answer is no both times.

The Court: Sustained.

Mr. Pearman: Let me rephrase that.

Q. Were you present when any other person talked to the defendant? Did you hear the defendant speak himself?

A. I don't recall hearing him speak.

Q. Were you present when a blood sample was offered to the defendant?

A. No, I was not.

Q. Were you present when the defendant was taken from the hospital to the jail?

A. Yes.

Q. And approximately what time was that?

A. I'd have to guess around 1:00 o'clock.

Q. How was the defendant transported to the jail?

A. In the police car.

Q. How was the defendant taken from the hospital to the police car?

A. He walked out to the police car.

Q. Did he have any type of cast or support on his leg to the best of your recollection?

A. No.

Q. Officer, from your observations of the defendant, were [fol. 140] you able to form any opinion as to whether the defendant was under the influence of an alcoholic beverage?

A. I was.

Q. What would be your opinion?

A. I would say he was well under the influence.

Q. Could you tell the Court upon what you based your opinion?

A. From the way he acted, the way he walked.

Q. Now, did you write the traffic accident report interview summary? Did you do the interviews at the scene of the accident?

A. I believe I did one only.

Q. Do you remember the name of the person you interviewed?

A. It seems to me it was Yellin. I am not sure.

Q. Did you interview Mr. Eaker?

A. No, I did not.

Q. Did you interview Mr. Schmerber?

A. No, I did not.

Mr. Pearman: I have nothing further.

The Court: Very well. I assume there will be some cross-examination.

Mr. McGurrin: Yes. It won't be too long. I'd like to get finished with the officer if I possibly could.

The Court: If you can, go ahead.

[fol. 141] Cross examination.

By Mr. McGurrin:

Q. When the defendant walked out of the Encino Hospital to the police car, you noticed his manner of walking at that time, is that correct?

A. Yes.

Q. That is one of the bases for forming the opinion that he was under the influence, is that correct?

A. Yes.

Q. Is that because of the manner in which he walked was an uncertain fashion or staggering or what was it?

A. Staggering.

Q. Do you recall whether he staggered evenly to the left and evenly to the right, or was there some staggering to one side more than the other?

A. I don't recall.

Q. Now, when you first arrived at the scene, where did your partner go?

A. I believe he got out of the police car and went south up toward the vehicle.

Q. Up toward the vehicle. Now, where was your partner when the ambulance left, if you recall?

A. I don't recall.

Q. Do you recall how long it was after you arrived that the ambulance left?

[fol. 142] A. I'd say several minutes after we arrived.

Q. Are you indicating two or three minutes?

A. Approximately, yes.

Q. Did you ever see your partner walk over to the ambulance?

A. I wasn't paying any attention.

Q. Did you ever see your partner standing next to the defendant?

A. Not to my knowledge.

Q. Did you ever see the defendant standing up at the scene?

A. No.

Q. You never saw him at all?

A. I don't remember seeing him at all.

Q. This was nighttime, right, and there was no artificial lighting?

A. Other than flashlights, no.

Q. In other words, it was black except for the illumination of the lights? Dark outside?

A. I would say so, yes, sir.

Q. Very dark except for the artificial illumination that was contributed by the flashlights?

A. Yes.

Q. Now, you indicated the tree was north of the car, is that correct?

A. I would say north and a little bit west.

[fol. 143] Q. It wasn't on the car? It was northwest of the car?

A. Yes.

Q. The ambulance was approximately how far from the car when you arrived there?

A. To the best of my recollection, it was a little bit south and east of the car, the curb.

Q. Southeast of the car?

A. Yes.

Q. Approximately how far?

A. I'd have to guess. Probably 10 feet.

Q. In other words, you could see it?

A. Yes.

Q. From the car, is that correct?

A. From the—

Q. From the car that was parked on the grassway?

A. You mean if I were sitting in that car?

Q. You said you went over there, I believe, didn't you?

A. I went over to the car.

Q. Yes. From that location you could see the ambulance, is that correct?

A. Yes.

Q. In other words, there was nothing obstructing your vision of the ambulance?

A. No.

[fol. 144] Q. Other than the particular darkness of the night, is that right?

A. Well, as I recall, the ambulance was well lit.

Q. Lights?

A. Everything.

Q. You left the hospital for the jail at approximately 1:00 o'clock in the morning?

A. That was my best guess.

Q. How long did you actually observe Mr. Schmerber at the hospital when he was lying down?

A. Oh, I'd say around five minutes.

Q. Did you notice whether or not his clothing was bloody?

A. As I recall, it was.

Q. The entire front area?

A. I would say he had spots of blood on his shirt.

Q. Do you recall whether or not you noticed any blood on his face?

A. I don't believe there was any.

Q. What time was it you say you saw him?

A. I'd estimate about 12:45, 1:00 o'clock.

Q. At that time there was no blood on his face?

A. No. No, there wasn't.

Q. Pardon me?

A. I say you are referring to the hospital?

[fol. 145] Q. Yes. You said you didn't see him anywhere else, is that right?

A. Right.

Q. So at the hospital then when you saw him at approximately 12:45 there was no blood on his face?

A. Not that I recall.

Q. There was none in his eyes?

A. No, there was none.

Q. Or his eyebrows or eyelashes?

A. No.

Q. Did you ever see anyone stitch his lip between the nose and the upper lip?

A. I did not.

Q. Did you notice when you say you saw his eyes blood-shot and watery whether or not there were any stitches in his lip at that time?

A. I don't recall.

Q. Do you recall whether or not there was any blood coming out of the area between his nose and his lip when you saw his eyes as you have indicated?

A. As I recall, there was no blood.

Q. Was there a bandage anywhere on him when you saw him at this time?

A. It seems to me that he had one or two bandages on his face when I saw him.

Q. You don't remember where they were?

[fol. 146] A. No, I don't.

Q. Do you recall whether or not his upper lip was swelled or swollen?

A. No, I don't.

Q. In other words, you wouldn't be able to say one way or the other that it was or it was not, is that correct?

A. No, I wouldn't.

Q. At the scene you looked at the car, is that correct?

A. True.

Q. The only person you talked to at the scene was whom?

A. I'm not sure. It was one of the property owners.

Q. Mr. William McCosty?

A. It could have been.

Q. When you saw Mr. Schmerber lying down, was he looking straight up at the ceiling?

A. Oh, at different times he was.

Mr. McGurrin: I have nothing further.
The Court: Any redirect?
Mr. Pearman: I'd like to ask one additional question.
The Court: Go ahead.

[fol. 147] Redirect examination.

By Mr. Pearman:

Q. When your police vehicle arrived at the scene, where was the first place you went after you got out of that police vehicle?
A. I went over to the car and got the license number.
Q. Was Officer Slattery with you at this time?
A. No, he wasn't.

Mr. Pearman: I have nothing further.

Recross examination.

By Mr. McGurrin:

Q. Where had he gone?
A. I didn't pay any attention.
Q. You didn't watch anything he did?
A. No, I did not.
Q. When he got out of the car?
A. No, I did not.
Q. When was the next time you saw him?
A. When I became aware of seeing him was probably five or 10 minutes later.
Q. Between the time you got out of the car and pulled up there you didn't see him for five minutes?
A. I didn't pay any attention to where he was.
Q. To the best of your recollection, you don't remember [fol. 148] seeing him there?
A. Apparently not.

Mr. McGurrin: Nothing further.
Mr. Pearman: Nothing further.

The Court: I take it this witness will not be needed any further?

Mr. Pearman: No.

Mr. McGurrin: No.

The Court: Thank you very much, officer. You are excused.

Ladies and gentlemen of the jury, we are going to take our noon recess at this time.

You are again reminded of the admonition that was previously given to you, which I will give you, even though there is a stipulation re: statement. You are not to discuss the matter with any other person, nor with any of your fellow jurors, nor are you to form any opinion or express any opinion on the facts of this case until it is submitted to you.

Now in view of the fact that I have a couple of complications today, our recess will be longer than usual. We will reconvene at 2:00 o'clock or as soon thereafter as is possible. We will expect you back at 2:00. Very well.

(Whereupon, at 12:05 o'clock P. M. an adjournment was taken until 2:00 o'clock P. M.)

[fol. 149] Los Angeles, California, Tuesday, April 27, 1965—2:20 P. M.

The Court: Good afternoon, ladies and gentlemen. I see the jury are all present and the defendant and counsel.

We will proceed with the People's next witness.

Mr. Pearman: I'd like to recall Officer Slattery for just one question.

The Court: All right.

EDWARD A. SLATTERY was recalled as a witness by and on behalf of the People, and having previously been duly sworn, resumed the stand and testified further as follows:

Direct examination (continued).

By Mr. Pearman:

Q. Officer Slattery, would you look at this analyzed evidence manila envelope and see if your signature appears on there?

A. Yes.

Q. Is there a date as to when your signature was placed on this?

A. Yes.

Q. Turning the envelope over, is this the wax seal that [fol. 150] you place on this manila envelope?

A. Yes.

Q. Where was this done?

A. This was done at West Valley Station.

Q. What is the date as indicated on there?

A. 11-14-64.

Q. Is there a time indicated on there?

A. No.

Mr. Pearman: I have nothing further.

Mr. McGurrin: May I look at it?

No questions.

The Court: You may step down, officer.

Mr. Pearman: The People would like to call Mrs. Geraldine Lambert.

Mrs. Geraldine Lambert was called as a witness by and on behalf of the People, and having first been duly sworn, was examined and testified as follows:

The Clerk: Would you state your name, please?
The Witness: Mrs. Geraldine Lambert. L-a-m-b-e-r-t.

Direct examination.

By Mr. Pearman:

Q. Mrs. Lambert, what is your occupation?
[fol. 151] A. Police chemist in charge of the Blood Alcohol Unit of the Los Angeles Police Crime Laboratory.
Q. How long have you been employed there?
A. Fifteen years.
Q. What training at colleges or universities have you had as well as traffic?
A. I received my Bachelor of Science Degree from UCLA. After graduation, I worked in private industry for two years as an analytical chemist. After coming on the Police Department, the City of Los Angeles sent me to specialized courses in the field of blood alcohol. This ran in 1948, '49, continued through the years '50 and up to the present. In 1954 I was one of four from the state appointed to the National Safety Council Chemical Test Committee, and it was as a result of that association I have participated with the American Medical Association and the National Safety Council in seminars and research in the field of blood alcohol.
Q. Is there a relationship between the amount of alcohol in the bloodstream and the degree of intoxication of a person?
A. There is.
Q. Would you please explain to the jury the way that this can be determined?
A. What do you mean?
Q. The amount of alcohol in the bloodstream.

[fol. 152] A. By taking a blood specimen and by six basic chemical methods, using one of them, extract the alcohol from the specimen and determine how much alcohol is in it per volume.

Q. Now directing your attention to this manila envelope, could I have this marked as People's 3 for identification?

The Court: It may be so marked.

By Mr. Pearman:

Q. Looking at this manila envelope, can you tell by looking at that envelope whether you have analyzed the contents inside the envelope?

A. Yes. I just handed it to you this afternoon.

Q. Can you tell by looking at the envelope from what is marked on there when this analysis was made?

A. Yes. I was asked to analyze a blood specimen booked to the name here and the date—

Mr. McGurrin: Excuse me. May the witness be directed to merely answer the question of counsel?

The Court: All right. Will you read the question, Mr. Reporter?

(The question was read by the reporter.)

The Court: If you can answer that question, please do so.

The Witness: Yes.

[fol. 153] By Mr. Pearman:

Q. What was the date the analysis was made?

A. Monday, November 16, 1964.

Q. Where did you receive the blood sample from?

A. In the Property Division of the Police Department, 150 North Los Angeles Street. I signed for it and asked for a particular name, date, and DR and was handed this envelope.

Q. Mrs. Lambert, would you open the envelope and look at the results of your analysis?

A. After analysis I resealed it and it is still sealed. Now I will tear the envelope and remove a worksheet in my handwriting, a business envelope with the printed name Encino Hospital, and then handwriting of time and signature and removing a vacutainer, containing a label with writing on it and writing on the gray stopper and containing, I would say, one-fifth blood specimen.

Q. Mrs. Lambert, after you had performed your analysis, what did you do with the manila envelope when you had finished it?

A. After I had read the writing on the outside as far as identification, name, date, DR, and also confirming the same information—

Mr. McGurrin: Pardon me. May the witness be instructed to merely answer the question of counsel? She is going on to relating all the things she does and every-[fol. 154] thing but what counsel asked her.

(The question was read by the reporter.)

The Court: What did you do with the manila envelope after the analysis was finished? I think that can be answered somewhat more directly.

The Witness: I took the manila envelope and wrote an S.I.D. number of 159 on it. I took the worksheet that I had used during my analysis and put it inside the envelope. I took the blood vial with the remaining blood specimen, put it back in the business envelope, and put it back in the manila envelope and then wrote .18 per cent BAWVG Lambert 11-16-64, and then sealed it.

By Mr. Pearman:

Q. How did you seal the envelope?

A. I had kept the envelope so as not to destroy the sealing wax which was originally sealing it, so that left a V cut, so when I put the things back, I sealed the V cut with scotch tape and then used a stapling machine and stapled the two flaps down.

Q. Then where did you put the manila envelope when you had finished doing that?

A. After I had finished making a laboratory analysis report, I took it back down to Property, rebooked it until yesterday afternoon. I signed it out for the second time, brought it to court and took it back to the Blood Alcohol [fol. 155] Laboratory and then handed it to you approximately a half hour ago.

Q. Thank you. Mrs. Lambert, could you briefly explain the procedure that you use in analyzing a sample of whole blood taken from an individual?

A. The method I use is the Kolvelk and Heinz method for the determination of ethanol.

The Court: Determination of what?

The Witness: Of ethanol. Ethyl alcohol.

By Mr. Pearman:

Q. Could you just briefly explain the procedure that you use in performing your analysis as simply as you can?

A. Well, it is called an oxidation reduction procedure for the determination of ethyl alcohol in blood or urine specimen.

Q. Is the whole procedure performed by you?

A. Yes.

Q. Mrs. Lambert, after performing the analysis, you came to a reading of .18, is that correct?

A. Yes.

Q. Could you with the Court's permission, would it be permissible for Mrs. Lambert to use the board, and explain the significance of the .18 per cent?

The Court: Yes. This will not be anything you wish to have memorialized, will it? If so, she can use a separate [fol. 156] piece of paper. Perhaps that would be the best procedure.

Mr. Pearman: Thank you, your Honor.

Q. Mrs. Lambert, would you draw a scale, indicating the various stages of intoxication, and explain what each means?

A. If no alcohol, the laboratory analysis will be reported as .00 per cent blood alcohol.

As alcohol accumulates in a person's body fluids, then it will show up, and going to .05 per cent blood alcohol. This concentration is the area where a person is not appreciably affected. We would determine or explain this concentration as being chemically sober.

Mr. McGurrin: May the jury be instructed at this time what the witness is testifying to is strictly her opinion?

The Court: The Court will instruct the jury in due course that the opinions of an expert witness are admissible but are not conclusive. A proper instruction will be given in due course.

Mr. McGurrin: Thank you, your Honor.

The Court: You can proceed, Mrs. Lambert.

The Witness: The .05 represents the accumulation of two ounces of 100 proof alcoholic beverage, which is 50 per cent alcohol by volume in a person approximately 150 pounds.

In the .05 to .10 per cent blood alcohol range persons [fol. 157] who are not used to drinking an alcoholic beverage will be affected by accumulating this amount. Persons who are used to drinking frequently will not be appreciably affected. Knowing nothing but a chemical test result in this range, it is my opinion persons possibly are under the influence.

In the .10 to .15 per cent range persons do come under the influence regardless of tolerance. All persons' mental abilities are impaired so that their driving ability will be affected. Knowing nothing about the person's tolerance, except the chemical test results in this range, it is my opinion that persons probably will be affected to a noticeable degree.

From the .15 per cent blood alcohol range to the .25 per cent blood alcohol range all persons will at least be under the influence.

In the .25 to .35 per cent range the impairment will be more gross and, to use a term to describe this more gross impairment, I refer to it as the obvious intoxication stage.

In the .35 to .45 per cent range you have your common drunk, falling down, unable to care for oneself.

In the .45 to .55 per cent range the anesthetic effect of alcohol takes place and a person passes out, so it is the comatose range.

If a person accumulated one-half of one per cent by [fol. 158] rapidly drinking an alcoholic beverage substance on a bet and actually accumulates one-half of one per cent, it will cause the heart and respiratory system to stop and death will result, so this is the lethal amount. So it is from there to here.

By Mr. Pearman:

Q. Mrs. Lambert, will you indicate on your diagram where the defendant's reading would come on that scale?

Mr. McGurrin: I will object to that question. I don't think the evidence has established that in fact this is the defendant's blood.

The Court: You can reframe the question. I won't pass on that point just yet. You can reframe the question.

I will sustain the objection. I think perhaps it may or may not be something that will be submitted to the jury. All I am saying is I will sustain the objection at this point. I will suggest that the City Attorney reframe the last question.

By Mr. Pearman:

Q. Mrs. Lambert, a person with a .18 per cent, what objective symptoms would be indicated without knowing anything about the defendant? What objective symptoms would be indicated with a .18 per cent?

A. It is my opinion when .18 per cent blood alcohol has been accumulated, they will at least be under the influence, [fol. 159] and under the influence is a term that I use to describe socially acceptable, but having noticeable objective symptoms of impairment due to this amount of alcohol accumulated. In other words, you will have mild objective symptoms, not falling down, not drunk in the terminology that I use unable to care for oneself, but they will be described as having had one too many. It's starting to show.

Q. Now, Mrs. Lambert, for a person weighing approximately 230 pounds with .18 per cent reading, approximately how many ounces of 86 proof alcohol would it take to obtain this reading?

Mr. McGurrin: I am going to object to the question on the ground there is no foundation laid that it would be material as to what a 230 pound person's alcoholic intake would be with a .18. There is no evidence that anyone in the case weighed 230 pounds.

The Court: I sustain the objection.

Mr. Pearman: It's a hypothetical question, your Honor, as to an expert witness.

Mr. McGurrin: I submit it's only material on direct examination if there has been evidence adduced beforehand with respect to the hypothetical question.

The Court: The People have not yet rested, and I presume this is properly a matter of the order of proof. Let [fol. 160] me see counsel at the bench briefly before I rule on it.

(Discussion at the bench between the Court and counsel, as follows:)

The Court: Well, I assume that you will still have the opportunity if you want to include any elements in the hypothetical that you haven't yet established. There is no evidence as to the defendant's weight. I would say this: If she is going to give various equivalents of different weights, I think it would be permissible even without giving

any specific indication as to what the defendant weighed. If you are going to just take a specific weight, I think perhaps it would be appropriate if you would be able to prove that is how much he weighed.

Mr. McGurrin: I will stipulate to 250. That is what it says in the report. Two hundred thirty. I don't know where he got the figure.

Mr. Pearman: I thought it was 230.

Mr. McGurrin: I didn't know how you got the figure 230.

The Court: I am sure she will give you a figure for 250 or 230 or whatever it is. All right. What I was going to say is you could pick a group of two or three figures, and she will give you the relationship, but as long as you will stipulate to 250, all right.

Mr. McGurrin: I will stipulate to 250.

(End of discussion at the bench.)

[fol. 161] The Court: For the record, it is my understanding that counsel are willing to stipulate, for whatever value or merits it may have, that on or about November 14th of 1964 the defendant had a body weight of 250 pounds.

Mr. McGurrin: Yes. That is correct, your Honor.

The Court: Is that stipulated by the People?

Mr. Pearman: Yes. So stipulated.

The Court: So if you want to reframe the hypothetical question as previously so as to correct the weight.

By Mr. Pearman:

Q. Mrs. Lambert, a person weighing 250 pounds with a .18 per cent blood alcohol reading, approximately how many ounces of 86 proof whiskey would it take to obtain this percentage figure?

A. For a 250 pound person to be .18 means at the time the specimen was collected there was the equivalent of approximately 12 ounces of 100 proof. Now, 86 proof is 14 per cent weaker, so 14 times 12, 168. Well, it would be another ounce and a half. So it would be 13 and a half

ounces approximately of 86 proof in the body fluids of a 250 pound person to be a .18.

Q. Mrs. Lambert, would you please explain what is meant by the term burn-off rate?

[fol. 162] A. Well, alcohol is a carbohydrate, but it cannot be stored, and it results in approximately a hundred calories per ounce. Therefore, the metabolic rate is about one ounce of 86 proof per hour, in percentage the average figure is .015 per cent per hour. So if a person, we'll say, is about 200 pounds and drank one drink one ounce per hour, and they drank six drinks in six hours, the chemical test would show 00, because the intake rate would be equal to the burn-off.

Q. The same hypothetical question I gave you concerning a 250 pound person who had a .18 per cent, if the test had been taken an hour and a half after, say, the last drink, or, say, the test had been taken immediately after the last drink, would the rate at that time be higher if the test had been performed immediately after the last drink or if it had been performed an hour and a half later than the last drink?

Mr. McGurrin: I object to the question as ambiguous and uncertain.

Mr. Pearman: That is a little confusing.

The Court: I will sustain the objection.

By Mr. Pearman:

Q. The point I am trying to get at, Mrs. Lambert, I didn't frame it very well, is would a person's test, would the percentage be higher if the test were taken three hours after or two hours after a person had had the last drink?

[fol. 163] A. Two or three hours after the last drink it would be lower.

Q. Say an hour and a half after the last drink, would it be higher or lower?

A. It would probably be lower. The peak is usually reached in about 45 minutes, and if no more consumption of an alcoholic beverage occurs, then it will decrease.

Mr. Pearman: I have no further questions.

I would like to have the People's Exhibit put in evidence.

Mr. McGurrin: I would have an objection. Wait until I cross-examine the witness. I will make an appropriate objection.

The Court: The two charts may be deemed marked for identification only. Are you including the charts?

Mr. Pearman: I was referring to the earlier chart and leading up to Mrs. Lambert's testimony.

The Court: I didn't know whether you included the two large items on the blackboard. The envelope, People's 1 and 2 have been received. People's 3 has been marked for identification, and I will defer a ruling on the admissibility until after the cross-examination. If you are offering any other items in evidence, let's wait until after her testimony.

[fol. 164] Cross examination.

By Mr. McGurrin:

Q. Mrs. Lambert, you are a Los Angeles police officer, is that correct?

A. Yes.

Q. How many years did you indicate that you have been assigned to the laboratory?

A. Fifteen years.

Q. Fifteen years. During that time you have run approximately how many blood alcohol tests?

A. Whole blood specimens, you mean?

Q. Yes. Right.

A. Well, we average about 200 per year plus, and I do at least 100 of those myself, plus research, so I would say, and then for two years I worked all by myself, so I would say several thousand or more. Many thousands.

Q. During the course of running those various tests and your studies with respect to running blood alcohol tests, what in your opinion are the various means by which errors can creep into the computation or the results of the test to show a higher reading than actually exists?

A. First of all, it is recommended that alcohol not be used as a sterilizing agent of the arm prior to penetrating [fol. 165] the body with the hypodermic needle for a venous puncture.

Q. Excuse me. You mean you shouldn't swab the arm with alcohol before you stick the needle in it?

A. Yes, or if you do, wait until it dries and evaporates.

Q. Can you tell me what else there might be?

A. That could pick up alcohol that should not be there and give a higher result. You only want that which would cause higher results?

Q. Yes, ma'am. Right.

A. Unclean glassware in the laboratory analysis. It doesn't need to be sterile. It needs to be chemically clean.

Improperly calibrated equipment. In other words, a person who is going to make competent blood alcohol analysis must have run known alcohol through to see that his technique, methods and equipment is calibrated accurately. It could be on the plus side. It could be on the minus side if good equipment is not used.

The other thing is just an incompetent person analyzing, not being competent. They could go higher or lower.

Q. What about the utilization of blood preservative?

A. You said you only wanted high.

Q. Yes.

[fol. 166] A. If you don't put in a preservative as a result of actual experimentation and putrefaction does set in, it reduces the alcohol. It doesn't increase.

Q. So a blood preservative would not be one of the errors which could cause an increase, is that correct?

A. That is right.

Q. What about non-clean solutions?

A. That is what I meant. You should have standardized solutions. You should standardize your solutions and have chemically clean glassware. Chemically clean glassware is the use of chromic acid for flushing glassware before proceeding with your analysis.

Q. We are talking about solution. We mean something which is like water. In other words, it pours when you say a solution?

A. Yes. There are other chemicals involved in the analysis that are not in liquid state, though.

Q. In this particular analysis you use in this particular type of situation?

A. There is one chemical that is not in a liquid state.

Q. What about the incorrect mathematical computation or calculation of the results?

A. That is why I leave my calculations here for inspection.

Q. I won't understand them, but may I look at them?

[fol. 167] A. It is simple subtraction and multiplication.

Q. That I can understand, I think.

A. The top is subtraction. The one to the right is multiplication, and there are two tests there. One, and then a line, and the second test.

Q. In other words, both tests were run by you?

A. Yes.

Q. And the first test it indicates a .17825, is that right?

A. Yes.

Q. The second one indicates .18630?

A. That is right.

Q. So you took the middle, which is a .18, is that right?

A. I reported as .18, yes.

Q. In other words, the calculations which you have indicated here, Mrs. Lambert, are the only calculations that you need to make with respect to reaching a determination as to the percentage of alcohol in the blood sample that you analyzed?

A. Yes. That is correct.

Q. Now, you are actually not an M.D., is that correct?

A. That is correct. I am not.

Q. Your degree is what?

[fol. 168] A. Bachelor of Science.

Q. Bachelor of Science. Now, have you ever run analysis or tests on individuals over a period of time, say, a couple

of hours, and during the period of time that elapses between the initial blood sample that you take and the last blood sample that you take from an individual the individual had, say, a pint or a quart of blood extracted from his person?

A. I have never had a blood sample taken before, but I have had one taken afterwards.

Q. In other words, after blood had been taken out of an individual or he lost it in some fashion or other?

A. I was going to say it was in an actual accident situation, where there was a blood loss and plasma was given.

Q. Previous to your taking or subsequent to your taking the blood sample?

A. No. The blood sample was taken after the medical treatment.

Q. So then so far as you are concerned you have actually conducted no tests yourself with respect to such a situation?

A. No. Where you had somebody take a blood specimen for alcohol and then have, say, donated a pint of blood, no, I have never done that and continue drinking.

[fol. 169] Q. Not continue drinking. Take a blood sample. The person loses whatever, a pint or quart of blood. Then take another blood sample.

A. No.

Q. Now, you indicated that a 250 pound person would have to consume a minimum of 12 ounces of a hundred proof alcohol to reach a reading of .18, is that correct?

A. I approximated it 12 ounces, yes, of a hundred proof.

Q. A 150 pound person to reach the same reading only has to consume what?

A. Seven.

Q. Seven ounces of a hundred proof?

A. A little over seven ounces.

Q. So that the bigger the individual, the more the consumption of alcohol has to be to make an equivalent reading in comparison with a smaller individual?

A. That is right. Yes.

Q. You indicated on direct examination that you'd have to have 13 and a half ounces of 86 proof for a 250 pound person to reach .18?

A. Yes. I believe that is my approximation.

Q. Now with respect to the consumption of beer, how many normal size beers would an individual have to consume to reach a .18 if that person is 250 pounds?

A. It would be the same, only 12 to an ounce size instead [fol. 170] of one ounce size. In other words, a 12 fluid ounce can or bottle of beer has one ounce of alcohol in it diluted 11 times. So it would be 13 and a half 12 fluid ounce bottles of beer would be equal to 12 and a half ounces of 86 proof.

Q. Thirteen and a half 12 fluid ounces of beer to reach a .18 reading for a 250 pound person, is that correct?

A. Pardon me. It would be 13 and a half. A 12 fluid ounce bottle of beer is equivalent to one ounce of 100 proof. I think my answer as an approximation of 13 and a half was based on 86 proof, so it would be 12, 12 fluid ounce bottles of beer.

Q. Now, you indicated that the burn-off rate is approximately equivalent to one ounce an hour, is that correct?

A. One beer per hour, yes, for a 200 pound person.

Q. One jigger, one ounce jigger?

A. A jigger is not one ounce. I believe a jigger is an ounce and a half.

Q. The jigger I am using is only an ounce. Using that jigger, it's equivalent to a can of 12 ounce beer?

A. Yes.

Q. When you analyze a blood sample and you reached your reading as you did in this case of .18, before that read- [fol. 171] ing of .18 can be of any value so far as you are concerned as an expert there must be objective symptoms or manifestations of intoxication that were observed by somebody else? Isn't that true?

A. As far as a particular defendant is concerned, yes. I don't know a thing about the case. I don't know who this name is and who the blood is. It is my opinion that there was .18 per cent, and .18 per cent in my opinion is

conclusive as far as being definitely under the influence. Now, whether this blood was properly collected, whether there was no alcohol present, this slip of paper by itself is not conclusive to a particular individual. I feel that this particular piece of paper, which in my opinion is an accurate result, must be corroborated through other evidence, such as proper collection, proper continuity, the blood came from the person in question, and if that is tied in, it is my opinion that there will be objective symptoms noticeable in that subject.

Q. Well, let me ask you this way, then: If it was concluded that there were no objective symptoms, but you had that same reading, something would be wrong either in the observations of the people who say there were no objective symptoms or in the analysis of the blood, isn't that true?

A. If the blood came from a subject that looks as you and I do now and showed a .18, I would say the result is [fol. 172] incorrect. In other words, you will have objective symptoms.

Q. Thank you. In other words, the analysis has to be supported by manifestations of the individual from whom the blood is supposedly taken?

A. (No response.)

Q. If you have a .18 and there are no objective symptoms by the individual, then something is wrong somewhere, isn't that true?

A. That is right. Yes. Yes.

Q. Of course, an individual who might observe what that individual believes an objective symptom doesn't, of course, know what is causing that particular thing that he is observing? Isn't that right?

A. That is true. That is why chemical tests were devised, to determine whether objective symptoms were due to injury, illness, drugs, or alcohol.

Q. Now, do you know from your recollection of the time when you have been on the Los Angeles Police Force

whether or not you yourself have made any errors in your computations for running of the blood alcohol tests?

A. I have had accidents, I know, and had to reanalyze it. I have dropped it. I came to court and left one boiling, and it takes 30 minutes to reduce, and I neglected to tell somebody to turn the heat off for me, and two hours later it boiled dry and exploded, so I have had to do it again. I [fol. 173] have had accidents such as that, but I know of no case where I have come to court with my calculations and have made an error, and I have participated approximately every three months for, say, at least a six year period correlation tests, California statewide, as well as some from New York and Chicago, which determines my degree of accuracy and technique, and it is within the one hundredths of one per cent variable allowable. I have had accidents, but never made an error so far as presenting the material in court.

Q. Do you by any chance when you run the blood alcohol test determine from the blood sample what type of blood it is, whether type O or type AO?

A. I don't do that. It can be done, though.

Q. In your laboratory?

A. By the other side of the lab. In other words, the blood alcohol lab is separated from the rest of the lab, so you'd have to go on the other side. I used to do blood typing for other reasons, but I don't type blood, no. The older it gets the more difficult it becomes to type, because of the emolusis of the corpuscles.

Q. In other words, it wasn't done in this case?

A. No, it was not.

Mr. McGurrin: I have no further questions.

The Court: Any redirect?

Mr. Pearman: No, your Honor. I have nothing.

[fol. 174] The Court: I take it this witness can be excused?

Mr. McGurrin: No objection.

The Court: Very well. Thank you very much, Mrs. Lambert. You are excused.

I assume, outside of offering the items in evidence, that is the People's case, is that correct?

Mr. Pearman: Yes, your Honor.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: At this time you want to offer the last item, which has been marked People's 3 for identification, the envelope and its contents, is that correct?

Mr. Pearman: Yes, your Honor, the envelope and the calculations.

The Court: If there is any objection, I will hear it at the bench.

Mr. McGurrin: Yes, your Honor.

(Discussion at the bench between the Court and counsel, as follows:)

Mr. McGurrin: My objection to the large sheet here is primarily based on the fact that contained on it is the fact that it has a charge of 23101.

The Court: That may be prejudicial. I will delete that if that is the only problem. I think that is proper.

Mr. McGurrin: What is the materiality of that?

The Court: As to the blood, it doesn't have to go to the [fol. 175] jury.

Mr. McGurrin: I don't see how it is material from the standpoint of the People from the standpoint of going to the jury for proving anything.

The Court: I think if it isn't offered, there is certainly no lack in the chain. I do not think it actually has to go in.

Mr. Pearman: It has the reading on it, and it has the seal and the way it was.

The Court: It's already been testified to. It's a part of the chain of custody. I don't think the jury has to take it with them. I will be glad to mask the charge or have it

obscured in some way to wipe it out with crayon, so the jury won't see it. Of course, I'm not sure anybody on the jury will know what a 23101 is anyway, but maybe they are more sophisticated than we give them credit for. So I think we had better mask it. I will indicate for the record that it will be done.

Other than that, I am not going to urge them to take it with them into the jury room, but I think there is a sufficient chain shown. It would always be better if the same person went from one end to the other, but once the stipulation is made as to the proper procedure and despite the mistake of the officers, it was a West L. A. Station.

Mr. Pearman: It was a West L. A. Station.

[fol. 176] The Court: West Valley, wasn't it? West L. A. is what I heard. Do the two other documents which have already been received indicate more clearly it was West Valley? I think it's been accounted for satisfactorily. Of course, with the vagueness it will create doubt, but I think it's a question of weight, not the admissibility.

Mr. McGurrin: All right. That was my basis.

The Court: I am tempted to admit it. As to the diagram, I assume the first chart, not Mrs. Lambert's chart, which is really part of her testimony, and I don't think that should come in, but as to the chart, do you have any objection?

Mr. McGurrin: I have no objection as to the first chart.

The Court: If that is offered, I will receive the first chart. I don't think I will receive her chart, which is really just some sort of a summary of her testimony.

Mr. Pearman: I think I would like to put her chart in, because it is fairly complicated testimony and a little hard for these people to visualize where a .18 comes into the reading. I know some of the people were writing this down. I would hate to have them copy it down wrong. We could have it taken into the jury room.

The Court: I will have it marked for identification. It isn't marked yet. I believe I did, however, mark People's 5 [fol. 177] for identification.

Mr. McGurrin: I would object to it. The other I have no objection to. All it is is like putting the testimony up there. In argument I think we can talk about it, but I object to its being offered in evidence.

The Court: I will have it marked for identification, so it's a part of the Court's records at least until the case is concluded. If there should be a necessity for having had any of the testimony read back, it can be read back, but I don't feel that the chart, it comes close to argument, a summary of what she is saying, and it is not actually necessary. It helps while she is presenting it, but I don't think it should be an Exhibit in evidence. That is what we will do.

I will simply have it marked for identification at this point. People's 5 for identification. I will receive 4, which will be the chart of the officer and the civilian witness have marked upon, and the defendant may use it themselves for all I know.

Mr. Pearman: People's 1 through 4 are received?

The Court: One and 2 have already been received. Now I will receive 3, although this will have to be obscured. And 4. Five will just be marked for identification.

The Court: For the record I have marked out the entire square and 23101 V.C. With the deletion, I will receive the [fol. 178] envelope in evidence.

(End of discussion at the bench.)

The Court: For the record, back in the presence of the jury, the Court has received in evidence the large manila envelope and its contents, which we previously marked People's 3 for identification. It's now received in evidence as People's 3.

The chart, not the one that is presently exposed, but the diagram of the scene will be received as People's 4. The present diagram is not in evidence. It's marked only for identification; that is the one that is presently shown.

I take it at this point, do the People have anything further to present?

Mr. Pearman: The People have nothing further.

The People rest.

The Court: The People rest. Very well.

At this point we will take a short recess now. We are a little disjointed this afternoon, but we are going to have to take a recess. Let's take it right now for 15 minutes, and then you can make a statement if you wish to.

Mr. McGurrin: Fine. Thank you, your Honor.

The Court: All right. We are in recess.

(Short recess.)

The Court: Very well. We will reconvene in the [fol. 179] Schmerber case.

* * * * * * *

[fol. 183] Your Honor, at this time may I have the following Exhibits marked and introduced into evidence?

Exhibit defendant's F, which is Encino Receiving Hospital, Receiving Hospital record, actually Thermofax copies of Exhibit F.

The Court: You have had a chance to see these?

Mr. Pearman: I have looked at them, your Honor, and I have no objection.

The Court: All right. The Encino records may be received as defendant's F.

Mr. McGurrin: Thank you.

May I say for the record that the two papers F, the top paper is actually the front of the Exhibit, of the original Exhibit from Encino, and the second copy is actually the [fol. 184] back of the front. In other words, you had to take it on two pieces of paper.

G is the rescue report from the Fire Department Ambulance Service for Mr. Schmerber.

The Court: All right. I take it there is no obection as to that either.

Mr. Pearman: No objection.

The Court: It will also be received in evidence as defendant's G.

Mr. McGurrin: H is a portion of the records from the Canoga Park Hospital with reference to Armando H. Schmerber.

The Court: All right. The same stipulation as to that, Mr. Pearman, is that correct?

Mr. Pearman: No objection.

The Court: Received as defendant's H.

Mr. McGurrin: I, the records of the Los Angeles County General Hospital, relating to Armando Schmerber, and the first date indicated is November 14th, I believe 12:38 P. M., 1964.

The Court: That is also covered by the previous stipulation?

Mr. Pearman: Yes.

The Court: That also is received as defendant's Exhibit I.

Mr. McGurrin: Defendant's J, Armando H. Schmerber, [fol. 185] hospital records, Canoga Park Hospital, relating to the second admission date for the ribs, November 29, 1964.

The Court: That also is covered.

Mr. Pearman: Yes, your Honor.

The Court: That will be received as defendant's J. I might say that the first five letters of the alphabet have been used for identification, but I don't believe they have been received.

Mr. McGurrin: That is correct. I offer to introduce A through E at this time as defendant's A through E.

The Court: The People are satisfied with the identification?

Mr. Pearman: Yes.

The Court: The previous Exhibits marked A through E for identification are now received in evidence with the same letters.

You may call your first witness.

Mr. McGurrin: Mr. Schmerber, will you please take the witness stand?

ARMANDO SCHMERBER the defendant herein, was called as a witness by and in his own behalf, and having first been duly sworn, was examined and testified as follows:

[fol. 186] The Clerk: State your name, please.
The Witness: Armando Schmerber. S-c-h-m-e-r-b-e-r.

Direct examination.

By Mr. McGurrin:

Q. Mr. Schmerber, what is your business or occupation?
A. Roofer, Local 36.
Q. I didn't hear the last.
A. Local 36.
Q. What does that mean?
A. That is roofer's Local.
Q. Referring you to the date of November 13, 1964, were you employed in that capacity as a roofer?
A. Yes, I was. Yes.
Q. What days are paydays in your particular business?
A. Fridays.
Q. Did you receive a check on that date on Friday, the 13th, 1964, in November?
A. Yes.
Q. Now, what time did you get off of work on that day?
A. Well, it was a late day. About 5:30.
Q. Did you do anything with your check?
[fol. 187] A. Went to the Bank of America, Northridge, and cashed it.
Q. What did you do after that?
A. Well, there was a message at the shop that my wife was waiting for me at my mother's house. After I cashed my check, I proceeded to go to my mother's house in Reseda.
Q. Whereabouts in Reseda?
A. It's on, oh, in Reseda, on Tampa Street off of Reseda Boulevard.
Q. You don't know what the address is, but you know where it is?

A. No, I don't.

Q. What time would you say you arrived at your mother's house?

A. I arrived anywhere between a quarter to 7:00 and 7:00 o'clock.

Q. Who was there at that time?

A. Just my wife.

Q. What happened then?

A. Well, we had dinner, watched a little television.

Q. During the time that you were there, did you drink anything of an intoxicating nature?

A. No, I didn't.

Q. Did you sometime after dinner and after watching TV leave that location of your mother's home?

[fol. 188] A. Yes, I did.

Q. About what time would you say that was?

A. Approximately a quarter to 10:00, 10:00 o'clock.

Q. Where did you go, sir?

A. Went to the J A Club.

Q. J A, not the A J?

A. A J or J A, on Ventura Boulevard.

Q. Ventura and what?

A. Ventura and Reseda Boulevard.

Q. When you arrived there, did you know anyone there, anyone in your family?

A. My brother was there.

Q. What is his name?

A. Joe Schmerber.

Q. Did you do anything with him?

A. We played some pool.

Q. This is with the balls on the table?

A. Right.

Q. Did you have anything to drink?

A. I ordered a beer.

Q. At any time after that or at any time did you see Lowell Eaker?

A. Lowell Eaker walked in a little later on.

Q. Did you have any conversations with him when he first walked in or sometime thereafter?

A. Sometime after.

[fol. 189] Q. Did you ever get into any type of game with him?

A. After my brother and I played a game, Lowell challenged the table.

Q. Challenged the table?

A. Yes.

Q. What does that mean?

A. Well, for instance, whoever loses, the challenger plays the winner.

Q. So that you wound up playing Lowell?

A. Lowell.

Q. Did you have any conversation with him with respect to building of any type, fences or home?

A. Yes. He was in the construction business.

Q. When did this conversation take place, during the game?

A. During the game.

Q. Did he indicate to you anything with respect to any particular location or place that he was aware or that had any type of masonry work?

A. Yes.

Q. What did he say in that respect?

A. He said there were some buildings going on on White Oak that he was working on or planning to move after it was completed.

Q. Pardon me?

[fol. 190] A. After they were completed.

Q. Did he ask you anything with respect to it or did you suggest anything?

A. I suggested seeing it.

Q. Pardon me?

A. I suggested to see it.

Q. What happened then with respect to how you got there or if you did?

A. I borrowed my brother's car, as I have got an old '55 Plymouth. My brother had a '64 Grand Prix. I borrowed my brother's car.

Q. Was there any conversation with Mr. Eaker relative to using his car?

A. His car was just as worse as mine.

Q. What happened? You got the keys from your brother?

A. I got the keys from my brother.

Q. Then what happened?

A. We proceeded to go to White Oak.

Q. Where is White Oak with respect to this particular location of the place where you were playing pool?

A. It would be east, I believe.

Q. You mean White Oak is east of that location?

A. No. It would be west according to that map, I believe.

[fol. 191] Q. Do you know for sure which way it is?

A. No, I don't. I am confused with the map.

Q. Did you actually then start driving the car?

A. Yes.

Q. Then what happened?

A. We proceeded to go toward White Oak. We never did get there, though. My nose started bleeding from the left side, across here. I pulled over to the driveway and asked Mr. Lowell to take me back.

Q. Where was this? Do you know where this was?

A. It was close to White Oak and Ventura Boulevard.

Q. Did you get in the back?

A. Yes. I stopped the car, opened the door, and laid in the back seat of the car and asked Lowell to bring me back.

Q. Did he start driving?

A. Yes, he did.

Q. Now, what do you recall after that?

A. I recall after waking up in the hospital and the doctor sewed my nose up.

Q. Did you actually know who that doctor was or not?

A. No, I don't.

Q. Was this the same time that you had a conversation with Officer Slattery about the blood test?

A. Yes, it was.

[fol. 192] Q. At the time that you were having your nose or your lip or what area—

A. Right underneath my nose. Between my lip right across here. It was open here and underneath my mouth, but the doctor couldn't sew underneath my mouth. Just up here.

Q. You are indicating immediately below your nose?

A. Below my nose here.

Q. Was that the only location sewed?

A. The only location sewed, but all the entire underside of my mouth was pulled out.

Q. Was your mouth swollen up?

A. It was swollen up; yes, it was.

Q. Do you recall any other place on your face?

A. My face, across here, the top.

Q. Indicating the right-hand side above your eye?

A. Right.

Q. Now, after the blood was taken from you, do you recall anything immediately thereafter or what is the next thing you recall?

A. I don't understand.

Q. In other words, what I am trying to find out is, after the blood was taken from you, do you recall then what happened after that or what is the next thing you recall after the blood was taken?

A. After the blood was taken?

[fol. 193] Q. Yes, sir.

A. I don't. I don't remember nothing else.

Q. Well, do you remember getting out of the Encino Hospital?

A. Oh, yes, walking out.

Q. Do you have any problems with your right leg at any time?

A. Yes.

Q. What was that?

A. It was just hurting all over. My whole body was hurting, my shoulders and neck and arms, my ribs, my right leg.

Q. Did you tell the officers when you walked out about your leg hurting?

A. Yes. They said it was just bruised.

Q. Did you ultimately sometime wind up at the General Hospital?

A. They took me to the North Hollywood Jail, where I complained to the jailor that I needed some medical attention, and they said they didn't have no facilities for medical attention, so they got a police car, to take me to the General Hospital, but they did not take me to the General Hospital. They took me to the old Lincoln Heights and booked me there for two hours.

Q. Then where did you go after that?

A. Then they had two officers take me to the General [fol. 194] Hospital.

Q. When you went to the General Hospital, what did they do to you?

A. It was mostly X-rays for about five hours, X-rays.

Q. Did they do anything with your right leg?

A. Yes, they did.

Q. What did they do?

A. They put a cast almost plum up to my hip.

Q. From where?

A. From my toes to my hip. My whole entire right leg.

Q. Did they do any more suturing or sewing of you?

A. No, they didn't.

Q. Then were you ultimately released then from the hospital, from the General Hospital?

A. From the General Hospital.

Q. Where did you go from there?

A. They took me back to Lincoln Heights.

Q. The police?

A. The police took me back to Lincoln Heights.

Q. Were you released from Lincoln Heights?

A. I put up bail. Right after I was released from the hospital, there was bail set for me.

Q. Where did you go from there?

A. Right directly to the family doctor of my mother and [fol. 195] father, to Canoga Hospital.

Q. Were you treated in the hospital there?

A. Yes, I was.

Q. Did you leave the hospital sometime then after the 14th when you entered the Canoga Hospital?

A. Yes. I was in there about two to three weeks.

Q. After you got out of the hospital, did you go back again?

A. Yes. I went home that day and came back that night. I couldn't sleep. I felt like my whole insides were caved in on my right side, so my wife got a hold of the doctor in the middle of the night for a prescription for pain pills.

Q. Did you go back into the hospital?

A. Yes.

Q. Did they take more X-rays of you?

A. Yes.

Q. What area of your body?

A. My right side on my ribs.

Q. How long did you stay in the hospital that time?

A. A couple of weeks.

Q. Was it that long?

A. A week and a half; something like that. I don't remember.

Q. I am talking about the second time.

A. The second time.

[fol. 196] Q. You will accept the hospital records as to what they say as to the length of time you stayed?

A. Yes.

Q. You have seen the photographs of the car that was defendant's A, B, C, D, and E?

A. Yes, I have.

Q. Do they fairly and accurately show the car as it appeared after the accident?

A. Yes, it does.

Q. Any time on the evening of the 13th were you under the influence of intoxicating liquor at any time on the evening of the 13th?

A. No.

Mr. McGurrin: I have no further questions.

The Court: You may cross-examine.

Cross examination.

By Mr. Pearman:

Q. Mr. Schmerber, you stated on this particular Friday this was payday, is that correct?

A. That is correct.

Q. And after you got paid you went home to your home or—

A. No. I went to the Bank of America, Northridge.

Q. After that where did you go?

A. I went straight home, to my mother's house.

[fol. 197] Q. How long were you there before you left to go down to this A J Tavern?

A. At my house?

Q. Yes.

A. Well, we were there from about 7:00 to 9:30 or so.

Q. Now, when you were at the A J Tavern, you stated that you left with Mr. Eaker and that you went out to look at a building or some construction or something like that?

A. Yes.

Q. Approximately how far was that construction site from this A J Tavern?

A. Roughly about a mile.

Q. You stated that you borrowed your brother's car on this particular evening?

A. Yes.

Q. Had you ever driven this car before?

A. Well, yes, I had. Yes.

Q. On how many occasions?

A. Not that particular day.

Q. Now, what was the reason for your borrowing your brother's car?

A. Well, my car was no good. It was an old car.

Q. Well, now, on this particular evening when you left your mother's house, did you drive your car down to the [fol. 198] A J Tavern?

A. Yes.

Q. You also stated that you had one beer before Mr. Eaker came in and one beer afterwards, is that correct?

A. Yes.

Q. Did you have any other beers at the A J Tavern other than those two?

A. No. Just two.

Q. Did you stop on the way to the construction site to have anything else to drink?

A. No, I didn't.

Q. So your testimony is that at no time on this particular evening did you stop with Mr. Eaker and have some whiskey, is that correct?

A. That is correct.

Q. Now, had you seen the construction site when you got this nosebleed?

A. No, sir. Never got there.

Q. Are you familiar with this diagram on the board there?

A. No.

Mr. McGurrin: Excuse me. I think the question is ambiguous, familiar with seeing it in court.

By Mr. Pearman:

Q. Are you familiar with the area?

[fol. 199] A. No, I am not.

Q. Then were you on Ventura Boulevard all the time you were driving?

A. Yes, I was.

Q. Where approximately did you pull off and let Mr. Eaker drive? Where was that?

A. Maybe a few blocks before you hit White Oak. Probably a block before you hit White Oak.

Q. At this time were you still on Ventura Boulevard?

A. We were still on Ventura Boulevard.

Q. Then he started driving back, is that correct?

A. That is correct.

Q. Now, is it true that Ventura Boulevard runs approximately west and east?

A. Yes.

Q. So, looking at the diagram on the board, Ventura Boulevard would be approximately north on that diagram, is that correct?

A. No, because I know I live north, because Ventura runs east and west.

Q. Isn't it a fact that Reseda Boulevard crosses Ventura Boulevard?

A. Yes, it does.

Q. Do you remember at any time Mr. Eaker pulling off of Ventura Boulevard?

[fol. 200] A. No, I don't.

Q. This particular car, your brother's car, is it a late model car?

A. It's a '64 or '63 Grand Prix.

Q. Do you know how long he has had the car?

A. How long he has had the car?

Q. Yes.

A. I don't know.

Q. Is it a fairly new car?

A. Fairly new car.

Q. You stated you had a nosebleed and then you pulled over and then you got in the back seat?

A. Yes.

Q. And then what did you do, put your head back?

A. I laid down on the back seat.

Q. Then after that I believe your testimony is you don't remember anything up until the time you were at the hospital?

A. I don't remember.

Q. At the hospital do you remember talking to Officer Slattery?

A. Yes.

Q. Do you remember him telling you that you had a right to remain silent and counsel and these type of things?

A. Yes.

Mr. McGurrin: What was the answer?

[fol. 201] The Witness: Yes.

By Mr. Pearman:

Q. Were you also conscious when he asked you if you wanted to take a breathalyzer test?

A. I didn't take no breathalyzer.

Q. Do you remember him asking you if you wanted to take a blood sample?

A. Yes.

Q. Do you remember agreeing to take the sample?

A. No.

Q. Your testimony is that you deny that you wanted to take this test?

A. Yes.

Q. Were you also conscious when the doctor did take the blood sample from your arm?

A. That I was what?

Q. Were you conscious when the doctor did take the blood sample from your arm?

A. Yes.

Q. Was Officer Slattery there?

A. Yes.

Q. What about Officer Buell? Was he there?

A. Restate the question again.

Q. Was Officer Buell present when the blood sample was taken from your arm?

A. Both of them were there.

[fol. 202] Q. Was Sergeant Smith there? Was there a third officer there?

A. No.

Q. Did you recognize Officer Slattery when you saw him in court?

A. Yes.

Q. Did you recognize Officer Buell, the second officer that testified?

A. No.

Q. From the time that the blood was taken from your arm at the hospital, you were conscious from that time up to the time you left the hospital, is that correct?

A. Yes.

Q. Approximately how long were you there at the hospital? Do you have any idea?

A. No idea at all.

Q. When you did leave the hospital, were you accompanied by two officers?

A. Two officers.

Q. Do you remember Officer Buell at this time?

A. No, I don't.

Q. You know the officer I am talking about, the second officer that testified?

A. Yes.

Q. At this time did you have any type of cast or anything on your leg?

[fol. 203] A. No, I did not.

Q. At this time did you have any type of bandages on your face?

A. Yes, I did.

Q. Where approximately were the bandages on your face?

A. Over my eye, over my cheekbone, across my ear here, across my nose.

Q. Were these bandages on your face when you came back and regained your consciousness?

A. Yes.

Q. You don't know whether they were put on at the hospital or in the ambulance, is that correct?

A. They were put on in the hospital.

Q. Were you conscious at all when these bandages were applied?

A. Yes.

Q. You were conscious?

A. Yes.

Q. When is the first time that you remember regaining consciousness? Was that in the hospital?

A. Right.

Q. Now, when you did leave the hospital, do you remember leaving with Officer Slattery, is that correct?

A. Yes.

Q. And the other officer was Officer Buell?

[fol. 204] A. Right.

Q. Did they take you out in a wheel chair or did you walk out by yourself?

A. I walked out.

Q. Were you at any time on that evening in a wheel chair?

A. That evening?

Q. Yes.

A. No, I wasn't.

Q. The other time were you laying on one of these flat tables, one of these medical tables?

Mr. McGurrin: I object as ambiguous. What other time is counsel referring to?

The Witness: I was in jail by then.

The Court: I sustain the objection. The answer is nonresponsive and will be stricken. Please reframe the question, counsel.

Mr. Pearman: Yes, your Honor.

Q. In other words, at the time you woke up were you laying on your back, were you flat on your back at this time?

A. I was sitting up.

Q. You were sitting up?

A. At the emergency hospital.

Q. Were you in a bed?

A. Yes.

[fol. 205] Mr. Pearman: I have nothing else, your Honor.

The Court: Any redirect?

Mr. McGurrin: No.

The Court: Very well. You may step down, Mr. Schmerber. Thank you.

Is there any further evidence other than documentary evidence, of course?

Mr. McGurrin: No.

The Court: Very well. Well, I had assumed we'd go a little later today than usual, but I think we could probably argue it tomorrow. Would that be more satisfactory?

Mr. McGurrin: Yes. I think the continuity would be better.

The Court: I think so, too. It's late in the afternoon.

We will recess, then, until tomorrow morning at 9:15.

Ladies and gentlemen of the jury, let's try to get here at 9:15. That goes for everybody. We want to try to get the argument over with and get the jury instructed expeditiously and give counsel all the time they need for argument. So let's everybody get here on time.

You are again reminded of the admonition that has previously been given to you on at least two occasions. I don't [fol. 206] think I need to repeat it again. We will see you tomorrow morning. We are in recess until 9:15.

(Whereupon, at 4:05 o'clock P. M. an adjournment was taken until 9:15 o'clock A. M., Wednesday, April 28, 1965.)

[fol. 207]

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

[Title omitted]

VERDICT—Filed April 28, 1965

We, the jury in the entitled cause, find the defendant Guilty of the offense charged.

A. F. Foss, Foreman.

Apr 28 1965

Violation—23102 V. C.

(Operating a motor vehicle on a street or public highway while under the influence of intoxicating liquor.)

[fol. 208]

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Municipal Court Number 79883

[Title omitted]

NOTICE OF APPEAL—Filed May 20, 1965

Defendant in the above-entitled action hereby appeal(s) to the Appellate Department of the Superior Court in and for the County of Los Angeles, State of California, from the Judgment of Conviction and order granting probation entered in the above-entitled municipal court on May 20, 1965 in favor of Plaintiff and against Defendant.

Thomas M. McGurrin, Attorney for Defendant.

Dated May 20, 1965

[File endorsement omitted]

[fol. 209]

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

No. 79883

[Title omitted]

PROPOSED STATEMENT ON APPEAL AND CERTIFICATION THEREOF—June 11, 1965

Grounds of Appeal

(1) Appellant was denied due process of law under the Fifth, Fourteenth, and Fourth Amendments to the Federal Constitution in that evidence obtained, including statements, as a result of an illegal search and seizure was introduced.

(2) Appellant was denied due process of law under the Fourteenth Amendment and the Sixth Amendment to the Federal Constitution in that statements and evidence was introduced in violation of his right to counsel.

(3) Appellant was denied due process of law under the Fourteenth Amendment and the Fifth Amendment to the Federal Constitution in that statements and evidence was introduced in violation of privilege against self-incrimination.

(4) Appellant was denied due process of law under the Fourteenth and Fifth Amendments to the Federal Constitution because evidence and statements involuntarily given were introduced in evidence.

[fol. 210] (5) Court erred in giving and failure to give instructions.

(6) Court erred in denying the appellant's motion for suppression of blood sample and all evidence relating thereto.

Statement of Facts

Appellant intends to file a Reporter's Transcript of the evidence and proceedings reported in the above matter and make it a part of this Statement as well as the below stated facts.

Appellant desires all Exhibits included.

Appellant desires the written Motion to Suppress Evidence included in the appeal.

There were no oral instructions given or refused.

Dated: May 24, 1965.

Thomas M. McGurrin, Attorney for Appellant.

[fol. 211] The Court does now settle and allow the foregoing Statement on Appeal and Reporter's Transcript and certifies that the same is a true and correct statement of the proceedings had in the above entitled action.

Dated: June 11, 1965

George M. Dell, Judge of the Municipal Court of Los Angeles Judicial District.

[File endorsement omitted]

[fol. 212]

In the Municipal Court of Los Angeles Judicial District

County of Los Angeles, State of California

Municipal Court No. 79883

Superior Court No. Cr. A. 6414

Clerk's Certificate of Record on Appeal—June 17, 1965

In accordance with Rule 3, Subdivision (b) of the Rules on Appeal from Municipal Courts in Criminal Cases, the statement on appeal, including the reporter's transcript, if any, having been settled and certified, or the time for filing the statement on appeal or reporter's transcript having elapsed.

I hereby certify that the following listed papers and records, comprising the record on appeal, are the originals, or if marked "copy" are true copies of the original on file in the above entitled case:

1. Complaint
2. Notice of Motion and Motion to suppress evidence
3. Points and Authorities in opposition of defendant's motion to suppress evidence
4. Jury instructions—given and refused
5. Verdict
6. Notice of Appeal
7. Proposed Statement on Appeal
8. People's exhibits 1 to 5
9. Defendant's exhibits A to J
10. Reporter's Transcript Volume I and II
11. Transcript of the docket
12. Clerk's certificate

George J. Barbour, Clerk Municipal Court of Los Angeles Judicial District, By Y. Yakomez, Deputy.

[fol. 213]

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 6414

Trial Court No. 79883

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

ARMANDO HOYAS SCHMEERBER, Defendant and Appellant.

On appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. George M. Dell, Judge.

JUDGMENT—August 24, 1965

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment and order granting probation made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.

By the Court.

McIntyre Faries, Acting Presiding Judge. H. Eugene Breitenbach, Judge. F. Ray Bennett, Judge.

[File endorsement omitted]

[fol. 214]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. CR A 6414

[Title omitted]

PETITION FOR REHEARING OR CERTIFICATION TO THE DISTRICT COURT OF APPEAL (RULE 63)—Filed August 27, 1965

Appellant respectfully requests that this Court reconsider its opinion in the above matter and schedule the case for a new hearing, or in the alternative, to certify the case for transfer to the District Court of Appeal. This request is based on the fact that Appellant believes that the issues raised by Appellant relative to the illegality of the arrest and the subsequent obtaining of evidence against Appellant raise serious questions of law which have never been decided by the Courts in California. The issue is constantly being raised and with the awareness of more counsel with the expanding theory of the Fourteenth Amendment relative to exclusion of evidence, there will be more and more appeals on the point unless the law is definitively set forth in an opinion.

Dated: August 26, 1965.

Respectfully submitted,

Thomas M. McGurrin, Attorney for Appellant.

[File endorsement omitted]

[fol. 215]

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 6414

Trial Court No. 79883

[Title omitted]

ORDER DENYING REHEARING AND DENYING CERTIFICATION—August 30, 1965

The petition of appellant for a rehearing after judgment of this court on appeal and petition for certification of cause to the District Court of Appeal in the above-entitled case having been filed and having been duly considered,

Said petitions are hereby denied.

Memo.

Defendant has requested a rehearing or certification to the District Court of Appeal. In this case there was overwhelming evidence of intoxication, and the taking or nontaking of blood and testing the same was but a minor factor and not controlling. The position of appellant substantially is that (1) Article VI, § 4½, is not applicable, or if applicable is not to be applied and may be unconstitutional under the Federal constitution, (2) the California decisions re blood tests, etc., are not good law because they require the defendant to be a witness against himself [fol. 216] and in this instance at least did violate his constitutional rights. Assuming that we might think so at times, it is not the province of this court to take issue with decisions of the California Supreme Court or other high courts or to hold portions of the constitution of California unconstitutional. *Barr Lumber Co.* v. *Shaffer* (1951), 108

[File endorsement omitted]

Cal. App. 2d 14, 22-23. 13 Cal. Jur. 2d 661-664, etc. *Akley* v. *Bassett* (1924), 68 Cal. App. 270, 228 P. 1057.

Dated 8/30/65.

By the Court.

Faries, Acting Presiding Judge, Bennett, Judge, Breitenbach, Judge.

[fol. 217]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No. CR A 6414

[Title omitted]

PRAECIPE-REQUEST FOR PREPARATION OF RECORD TO UNITED STATES SUPREME COURT—Filed September 15, 1965

Appellant intends to file a Petition for Writ of Certiorari to the United States Supreme Court on the above entitled matter and requests preparation of a certified copy of the record in the Appellate Department including the following:

1. Notice of Appeal
2. the Complaint
3. Transcript of Docket
4. the verdict
5. the judgment
6. The written Motion for Suppression including Declaration of Armando H. Schmerber
7. Judgment of Appellate Department
8. Order Denying Rehearing and Denying Certification.

9. Certified Statement on Appeal

10. Petition For Rehearing

[fol. 218] 11. Clerk's Certificate of Record on Appeal

It is also requested that the Reporter's Transcript (2 volumes) be obtained for forwarding to the United States Supreme Court.

The Petition will be filed October 11, 1965.

Dated: September 13, 1965.

Thomas M. McGurrin, Attorney for Appellant.

[fol. 219] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 220]

SUPREME COURT OF THE UNITED STATES

No. 658, October Term, 1965

ARMANDO SCHMERBER, Petitioner,

v.

CALIFORNIA.

ORDER ALLOWING CERTIORARI—January 17, 1966

The petition herein for a writ of certiorari to the Appellate Department of the Superior Court of the State of California, County of Los Angeles, is granted and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
OCT 21 19
JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

October Term 1965

No. 658

ARMANDO SCHMERBER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the United States.

THOMAS M. McGURRIN,
315 South Beverly Drive,
Beverly Hills California,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

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TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term 1965
No. .....

ARMANDO SCHMERBER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the United States.

Petitioner, Armando Schmerber, respectfully prays for a Writ of Certiorari to the Supreme Court of the United States, in order to review a judgment of the Appellate Department of the Superior Court for the County of Los Angeles, State of California, affirming Petitioner's conviction by the Municipal Court of the Los Angeles Judicial District, of the charge of driving on a public highway while under the influence of intoxicating liquor, and sentencing him to thirty (30) days in jail.

Opinions.

The trial court issued no formal opinion. The Appellate Department of the Superior Court issued no formal opinion but affirmed without opinion.

Jurisdiction.

The judgment of the Superior Court of the County of Los Angeles, State of California was entered on August 24, 1965. A timely petition for rehearing filed on August 27, 1965 was denied on August 30, 1965. (Appendix A and B respectively.)

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3).

Questions Presented.

I.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute a Violation of Due Process.

II.

Does the Taking of a Sample of Blood From a Person Over His Objection That Counsel Has Advised Him Not to Give Such a Sample Constitute a Denial of the Right to Counsel.

III.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute an Unlawful Search and Seizure.

IV.

Does the Introduction Into Evidence of a Person's Blood Sample or His Refusal to Take a Blood Test Constitute a Denial of the Privilege Against Self-Incrimination.

Constitutional Provisions Involved.

The Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution provide in part as follows:

FOURTH AMENDMENT

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ."

FIFTH AMENDMENT

". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty . . . without due process of law . . ."

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

FOURTEENTH AMENDMENT

". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

Statement of Case.

(a) How Federal Question Was Presented.

Petitioner, in pre-trial proceedings filed a written motion to suppress the evidence of the blood tests and all circumstances surrounding it including the refusal to take the test. The written motion asserted that the taking of the blood was a violation of the Fifth and Fourteenth Amendments to the United States Constitu-

tion. The motion was denied. [R. T. pp. 2-7.] The same motion was renewed during the trial and denied. [R. T. p. 101, lines 10-26, pp. 102-107.]

Petitioner's brief in the Appellate Department of the Superior Court of the County of Los Angeles asserted that the introduction of the evidence of the blood test as well as the testimony relating to the circumstances surrounding its taking, including the refusal, was a violation of Petitioner's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The Appellate Department of the Superior Court of Los Angeles County is the highest court in the State of California to which an appeal may be had from a Municipal Court wherein Petitioner was convicted.

(b) Petitioner was involved in an automobile accident when the car he was allegedly driving struck a tree. He was observed at the scene by a Los Angeles Police officer as Petitioner was being placed in the ambulance. [R. T. p. 68.] Petitioner received treatment at the hospital for various lacerations. He had a fractured ankle and two fractured ribs. (Appx. C.) While in the hospital the Los Angeles Police officer asked Petitioner to agree tc a blood sample. The Petitioner initially stated he would give a sample. Previous to the taking of the sample the Petitioner told the officer that he objected and would not give such sample since his attorney had advised him not to give such a sample.

[R. T. p. 97, line 26; p. 98, lines 1-20.] Additionally, Petitioner's affidavit supporting his motion for suppression was uncontradicted by the People and contained the statement that a further basis for his refusal was "because of my privilege against self-incrimination contained in the California Constitution and the Fifth and Fourteenth Amendments to the Federal Constitution." (Appx. C.)

The officer directed the doctor to take the blood sample over Petitioner's objection. Although the officer testified he had arrested Petitioner previous to the request for extracting the blood the City Attorney had stipulated to the correctness of Petitioner's affidavit wherein it alleges that the arrest took place after the blood withdrawal. [R. T. p. 4, lines 5-6; Appx. C.]

The results of the blood test was introduced in evidence and an expert testified it showed the Petitioner was under the influence of intoxicating liquor. Of all the witnesses produced by the People who observed Petitioner, only the officers testified to his being under the influence. [R. T. p. 28, lines 6-12; pp. 33-53.]

REASONS FOR GRANTING THE WRIT.

I.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute a Violation of Due Process.

As stated in Chief Justice Warren's dissent in this Court's 5-4 decision in *Breithaupt v. Abram,* 352 U.S. 432:

> "In reaching its conclusion that in this case, unlike *Rochin,* there is nothing 'brutal' or 'offensive' the Court has not kept separate the component parts of the problem. Essentially there are two: the character of the invasion of the body and the expression of the victim's will; the latter may be manifested by physical resistance. Of course, one may consent to having his blood extracted or his stomach pumped and thereby waive any due process objection. In that limited sense the expression of the will is significant. But where there is no affirmative consent, I cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest. The Court, however, states that 'the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right.' This implies that a different result might follow if Petitioner had been conscious and had voiced his objection. I reject the distinction.
>
> "Since there clearly was no consent to the blood test, it is the nature of the invasion of the body that should be determinative of the due process

question here presented. The Court's opinion suggests that an invasion is 'brutal' or 'offensive' only if the police use force to overcome a suspect's resistance. By its recital of the facts in *Rochin*—references to a 'considerable struggle' and the fact that the stomach pump was 'forcibly used' —the Court find *Rochin* distinguishable from this case. I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights.

"Apart from the irrelevant factor of physical resistance, the techniques used in this case and in *Rochin* are comparable. In each the operation was performed by a doctor in a hospital. In each there was an extraction of body fluids. Neither operation normally causes any lasting ill effects. The Court denominates a blood test as a scientific method for detecting crime and cites the frequency of such tests in our everyday life. The stomach pump too, is a common and accepted way of making tests and relieving distress. But it does not follow from the fact that a technique is a product of science or is in common, consensual use for other purposes that it can be used to extract evidence from a criminal defendant without his consent. Would the taking of spinal fluid from an unconscious person be condoned because such tests are commonly made and might be used as a scientific aid to law enforcement?

"Only personal reaction to the stomach pump and the blood test can distinguish them. To base the restriction which the Due Process Clause imposes on state criminal procedures upon such reac-

tions is to build on shifting sands. *We should, in my opinion, hold that due process means at least that law enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth.*" (Emphasis added.)

This Court now holds that the Fifth Amendment is applicable to the States through the Fourteenth Amendment.

Malloy v. Hogan, 378 U.S. 1, 12 L. Ed. 2d 653, 85 S. Ct. .....

Thus, the argument that the Fifth Amendment doesn't apply to the States, which was the argument asserted by the majority in *Breithaupt*, is no longer a valid support.

Due Process to have a meaning, should unequivocally mean that police may not commit assault and battery on an accused person for the purpose of obtaining evidence to use against him. Why should this Court interpret the Constitution to allow physical evidence obtained as a result of battery (nonconsensual insertion of needle through skin) and theft (nonconsensual taking of personal property—blood) to be used against a defendant when it has held that obtaining oral incriminatory utterances by such means is violative of due process?

Brown v. Mississippi, 297 U.S. 278.

To attempt to draw such a distinction makes a mockery of the Constitution.

Under the present status of the law in California, and in many States, *Breithaupt* is the support for the police to invade person's bodies and extract what evidence they need to help them convict the accused.

People v. Duroncelay, 48 Cal. 2d 766;

State v. Berg, 76 Ariz. 96, 259 P. 2d 261;

State v. Cram, 176 Ore. 577, 160 P. 2d 283.

A decision by this Court is essential to clearly define and limit the claimed right of the police to invade the bodies of citizens and extract from them blood which in no way is contraband.

It seems unreasonable to say that only if the accused commits a crime[1] by physically resisting the withdrawal of blood does due process and *Rochin* apply. To follow this reasoning in effect would encourage commission of crimes by an accused in order to protect his constitutional rights. Such reasoning and result would be an anomaly.

This procedure is also violative of due process since it, in effect, amounts to forcing a person to admit to a crucial part of the People's case. If physical force or other objectionable practices were used to extract an oral or written admission or confession the admission or confession would be inadmissible.

Brown v. Mississippi, 297 U.S. 278;

Ashcroft v. Tennessee, 322 U.S. 143;

Mallory v. United States, 354 U.S. 449.

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[1]California Penal Code 148, 242, 243, 834a. These sections provide among other things, that one shall not resist, obstruct, or delay an officer in the discharge of his duties, nor shall one commit a battery on an officer or resist an arrest.

There is no valid distinction between such judicially condemned practices and the conduct of the police in this case. The result is the same—force is used to extract incriminating evidence from a person.

II.

Does the Taking of a Sample of Blood From a Person Over His Objection That Counsel Has Advised Him Not to Give Such a Sample Constitute a Denial of the Right to Counsel.

A defendant is entitled to an attorney at all stages of the proceedings.

Gideon v. Wainright, 372 U.S. 335 ....;

Escobedo v. Illinois, 378 U.S. 478;

Massiah v. United States, 377 U.S. 201.

When Petitioner advised the police he objected to the blood test because his attorney had advised him not to take it he was certainly exercising his right to counsel. [R. T. pp. 97-98.] How else can a defendant or anyone utilize advice given by counsel except by adhering to the advice given? Here, the conduct of the police in taking Petitioner's blood over his objection and contrary to his counsel's advice, effectively constituted a denial of the right to counsel. This type of conduct by the police if condoned gives the police the right to deny counsel to defendant because the end result is the same —If he doesn't have counsel he takes the test voluntarily—if he has counsel he takes the test involuntarily.

The value of *Escobedo* and *Massiah* are negated if the police can thusly overcome the right to counsel.

III.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute an Unlawful Search and Seizure.

Petitioner contends that there was an illegal arrest in this matter and that any resultant search was illegal. However, since the trial court held the arrest was legal Petitioner will assume this as true for the purposes of present argument herein.

The framers of our Constitution certainly would have repelled at the thought that someday police officers would claim a right to enter the body of a person, for the purpose of obtaining evidence against him which isn't even contraband, after they have made a lawful arrest. To follow the reasoning that such practice is constitutional, if proper medical means are followed, leads one to the conclusion that exploratory surgery of the abdomen would be proper to prove that a person had narcotics and had swallowed it. The "logic" becomes more frightening when it is realized that the police will be the ones making the decisions and not anyone else. Certainly we must face up to the obvious conclusion that puncturing the body constitutes an unreasonable search and seizure.

By recent decisions the Federal standards of search and seizure apply to the States.

Mapp v. Ohio, 36 U.S. 643;

Ker v. California, 374 U.S. 23.

IV.

Does the Introduction Into Evidence of a Person's Blood Sample or His Refusal to Take a Blood Test Constitute a Denial of the Privilege Against Self-Incrimination.

It seems fallacious to hold, as the California Courts have, that since the taking of blood doesn't amount to testimonial compulsion there can be no violation of the privilege against self-incrimination.

People v. Haeussler, 41 Cal. 2d 252.

Such an argument completely ignores the realities of the situation. Certainly a person is "giving" evidence against himself when blood is being extracted from his veins. What is the difference between forcing a defendant to testify he has consumed sufficient alcoholic beverages to become intoxicated or taking his blood and proving by its content that he has consumed that particular amount of alcoholic beverage?

It seems that the latter procedure is even more incriminating. An attempt to draw a *valid* distinction does not result in a reasonable answer.

Allowing into evidence the fact of refusal to take a breathalyzer and blood test and allowing comment on it penalizes a defendant for the assertion of his constitutional privilege against self-incrimination. [R. T. p. 110, lines 1-24; p. 263, lines 6-10.] The Court in advising the jury that they could consider all the evidence regarding the blood test indirectly advised the jury they could draw adverse conclusions from Petitioner's assertion of his right not to take any tests. Such an instruction effectively negates the constitutional right of the person asserting his rights and is contrary to the law.

Griffin v. California, 380 U.S. .....

Conclusion.

For the reasons herein stated, Petitioner respectfully urges that his Petition for Writ of Certiorari should be granted.

Dated: October 1965.

Respectfully submitted,

THOMAS M. MCGURRIN,
Attorney for Petitioner.

APPENDIX A.

Judgment.

In the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. Superior Court No. CR A6414, Trial Court No. 79883.

People of the State of California, Plaintiff and Respondent, vs. Armando Hoyas Schmerber, Defendant and Appellant.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. George M. Dell, Judge.

Filed Aug. 24, 1965.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment and order granting probation made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.
August 24, 1965.

By the Court.

McIntyre Faries
Acting Presiding Judge.

H. Eugene Breitenbach
Judge.

F. Ray Bennett,
Judge.

APPENDIX B.

Order Denying Rehearing and Denying Certification.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

The People of the State of California, Plaintiff and Respondent, vs. Armando Hoyas Schmerber, Defendant and Appellant. Superior Court No. CR A 6414, Trial Court No. 79883.

The petition of appellant for a rehearing after judgment of this court on appeal and petition for certification of cause to the District Court of Appeal in the above-entitled case having been filed and having been duly considered,

Said petitions are hereby denied.

MEMO.

Defendant has requested a rehearing or certification to the District Court of Appeal. In this case there was overwhelming evidence of intoxication, and the taking or non-taking of blood and testing the same was but a minor factor and not controlling. The position of appellant substantially is that (1) Article VI, § 4½, is not applicable, or if applicable is not to be applied and may be unconstitutional under the Federal constitution, (2) the California decisions re blood tests, etc., are not good law because they require the defendant to be a witness against himself and in this instance at least did violate his constitutional rights. Assuming that we

might think so at times, it is not the province of this court to take issue with decisions of the California Supreme Court or other high courts or to hold portions of the constitution of California unconstitutional. *Barr Lumber Co. v. Shaffer* (1951), 108 Cal. App. 2d 14, 22-23. 13 Cal. Jur. 2d 661-664, etc. *Akley v. Bassett* (1924), 68 Cal. App. 270, 228 P. 1057.

Dated August 30, 1965.

By the Court.

Faries
Acting Presiding Judge

Bennett
Judge

Breitenbach
Judge

APPENDIX C.

Affidavit.

State of California, County of Los Angeles—ss.

I, Armando H. Schmerber, say:

I am the Defendant in the case of People v. Armando, H. Schmerber.

On November 14, 1964, I was taken by ambulance to the Encino Hospital about 12:30 A.M. I was requested to submit to extraction of blood at the hospital at approximately 2:00 A.M. on November 14, 1964. I refused to allow the extraction of blood. Over my objection and at the order of one or more Los Angeles police officers, I believe Sgt. J. A. Smith and E. A. Slattery, my blood was taken from me against my will by a Dr. W. Brooks. I refused said taking of my blood because my attorney had advised me to refuse such a test, and because of my privilege against self-incrimination contained in the California Constitution and the Fifth and Fourteenth Amendments to the Federal Constitution.

At the time of taking of the blood I had one broken rib, a fractured right leg and lacerations on my forehead and nose. At this time I was in severe pain and any movement by myself caused me great pain. As a consequence of the pain I could not and did not physically resist the taking of my blood.

I was arrested on November 14, 1964 by Los Angeles police officers some time after the taking of my blood for an alleged violation of Vehicle Code 23101.

I desire the return of my blood sample, all records of the result of any analysis of my blood sample, and suppression of any oral evidence of the results of said blood tests.

I declare under penalty of perjury the foregoing is true and correct.

Executed on January 26th, 1965
at Saugus, California.

Armando H. Schmerber /s/
Armando H. Schmerber

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

IN THE

Supreme Court of the United States

October Term 1965
No. 658

ARMANDO SCHMERBER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

Statement.

Petitioner was charged by the People of the State of California in a verified complaint with a violation of Sections 23102 [Appx. A] and 12951 of the Vehicle Code of the State of California, misdemeanors.

He was duly arraigned, informed of the charges against him and of his legal rights, entered a plea of not guilty and demanded a jury trial. Prior to trial Count II was dismissed.

Petitioner was convicted of violating Section 23102, sentenced to 30 days in the County Jail, and fined $250.00. He appealed to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, which court affirmed the judgment

of conviction without opinion. A petition for rehearing and/or certification to the District Court of Appeal was denied. Petitioner now seeks a writ of certiorari in this court.

Facts.

A police officer, arriving at the scene of an automobile accident, observed that Lowell Eaker was already in the ambulance and petitioner was being placed in the ambulance [R. T. p. 118, line 16-20]. The officer observed petitioner's face at this time and noted his eyes were bloodshot and watery and had a glassy appearance. An odor of alcohol was on petitioner's breath [R. T. p. 68, lines 11-19]. After an investigation at the scene, the officer determined that the vehicle had been driven on the wrong side of the street [R. T. p. 95, lines 19-25]. Eaker told the officer that petitioner was the driver of the vehicle [R. T. p. 89, lines 11-13]. At the hospital the officer noted petitioner's speech was slurred, and he formed the opinion that petitioner was under the influence of alcohol [R. T. p. 70, lines 21-22; p. 71, lines 1-3]. Petitioner was arrested at the hospital for a violation of Section 23101 of the Vehicle Code [Appx. B] and informed that he was entitled to the services of an attorney, that he could remain silent, and that anything he said could be used against him [R. T. p. 70, lines 13-16].

The officer asked petitioner if he had any objection to the taking of a blood sample and he replied he did not [R. T. p. 97, lines 12-13]. When the doctor was preparing to extract the blood petitioner said he didn't think he should do it as his attorney advised him not to [R. T. p. 98, lines 2-10]. Petitioner stated he would not fight the extraction of blood as the officer had told him

he would indicate in his report that petitioner had objected and had not used any physical force in his objection. The blood was extracted from petitioner by Dr. Brooks under standard medical procedure [R. T. p. 113, lines 16-19].

An analysis of the blood sample introduced in evidence resulted in a reading of .18 blood alcohol [R. T. p. 155, line 18-20]. An expert testified that all persons would be under the influence of alcohol with this blood alcohol reading [R. T. p. 157, lines 14-16].

ISSUES PRESENTED.

I.

Taking a Sample of Blood Does Not Constitute a Violation of Due Process.

A blood test taken by a skilled technician is not such "conduct that shocks the conscience," nor such a method of obtaining evidence that it offends a "sense of justice."

Breithaupt v. Abram, 352 U.S. 432, 1 L. ed. 2d 448;

People v. Haeussler, 41 Cal. 2d 252;

People v. Duroncelay, 48 Cal. 2d 766;

People v. Huber, 232 Cal. App. 2d 663.

The blood sample was extracted by a doctor in a medically approved manner. No force was used during the extraction of the blood. Extraction of blood for testing purposes is an experience many persons undergo daily without hardship or ill-effect. Such removal of blood does not constitute brutality, shock the conscience or deprive one of due process of law.

Even if compulsion is used in taking the blood sample, admission in evidence of the blood is not a denial of due process.

People v. Duroncelay, supra;

People v. Conterno, 170 Cal. App. 2d Supp. 817.

Blood alcohol tests may serve to exonerate the accused as well as to convict.

People v. Bellah, 237 A.C.A. 129.

II.

A Person Has No Right to Decline a Blood Test.

A defendant under lawful arrest does not have any constitutional right under California Constitution, Article I, Section 13, giving a privilege against self-incrimination, to decline a blood alcohol test, properly administered, and no federal constitutional right is violated by requiring him to submit to such a test.

People v. Conterno, supra.

The privilege against self-incrimination relates only to testimonial compulsion and not to real evidence.

People v. Duroncelay, supra;

People v. Huber, supra;

People v. Fuller, 236 A.C.A. 1016.

The introduction of the blood sample in evidence does not violate the privilege against self-incrimination as that privilege is limited to the right of an accused not to be compelled to orally testify against himself at his trial.

III.

Taking Sample of Blood Does Not Constitute an Unlawful Search.

A search may be made incident to a lawful arrest.

People v. Winston, 46 Cal. 2d 151;

People v. Duroncelay, supra;

People v. Robinson, 62 Cal. 2d 889.

Where there are reasonable grounds for an arrest, a reasonable search of a person and the area under his control to obtain evidence against him is justified as an incident to the arrest, and the search is not unlawful merely because it precedes rather than follows the arrest.

People v. Duroncelay, supra.

The efficacy of a blood test depends upon it being made as soon as possible after the time of the offense. The intoxicating effect of alcohol diminishes with the passage of time.

In re Newbern, 175 Cal. App. 2d 862;

In re Howard, 208 Cal. App. 2d 709;

In re Martin, 58 Cal. 2d 509.

The making of a blood alcohol test without the petitioner's consent does not violate the Fourth Amendment to the United States Constitution.

People v. Conterno, supra;

People v. Pack, 199 Cal. App. 2d 857.

In *Huber, supra*, a blood sample was withdrawn not for the purpose of treating the defendant, nor for saving his life, nor for his direct benefit, but was taken for the purpose of reducing the alcohol in defendant's blood

to possession—to protect the alcohol content in the blood from destruction and to preserve it for presentation to the court. This was not an unreasonable search, nor was it a denial of due process of law.

Petitioner's affidavit states that the blood sample was taken prior to his arrest. While the prosecution did not controvert petitioner's affidavit at the hearing on the motion to suppress, the evidence presented at trial showed the arrest was made before the extraction of the blood [R. T. p. 70, line 13]. No testimony was presented by petitioner during the trial as to the time of the arrest in relation to the taking of the blood sample.

The taking of the blood sample incident to the lawful arrest of petitioner was not an unreasonable search.

IV.

The Supreme Court of the United States Should Not Take Jurisdiction to Review an Order Where No Opinion Was Delivered by the Highest State Court.

The record and the petition for writ of certiorari disclose that no opinion was delivered by the Appellate Department of the Superior Court for Los Angeles County when the judgment was affirmed. A Memo setting forth the reasons for denying the petition for rehearing and/or certification was prepared by the court.

In *Stembridge v. State of Georgia,* 343 U.S. 541, 96 L. ed. 1130, it was held that, where the highest court of the state delivers no opinion and it appears the judgment might have rested upon a non federal ground, this court will not take jurisdiction to review the judgment.

Conclusion.

The petition for writ of certiorari does not disclose that there has been a violation of petitioner's rights under the federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this court, or decided a federal question of substance not theretofore determined by this court.

It is urged that the petition be denied.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,
PHILIP E. GREY,
Assistant City Attorney,
WM. E. DORAN,
Deputy City Attorney,
MICHAEL T. SAUER,
Deputy City Attorney,
Attorneys for Respondent.

APPENDIX A.

California Vehicle Code Section 23102A

It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway.

APPENDIX B.

California Vehicle Code Section 23101

Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony. . . .

IN THE

Supreme Court of the United States

October Term 1966

No. 658

ARMANDO SCHERFFIUS,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, County of Los Angeles.

BRIEF OF PETITIONER.

THOMAS M. McGUIRE,
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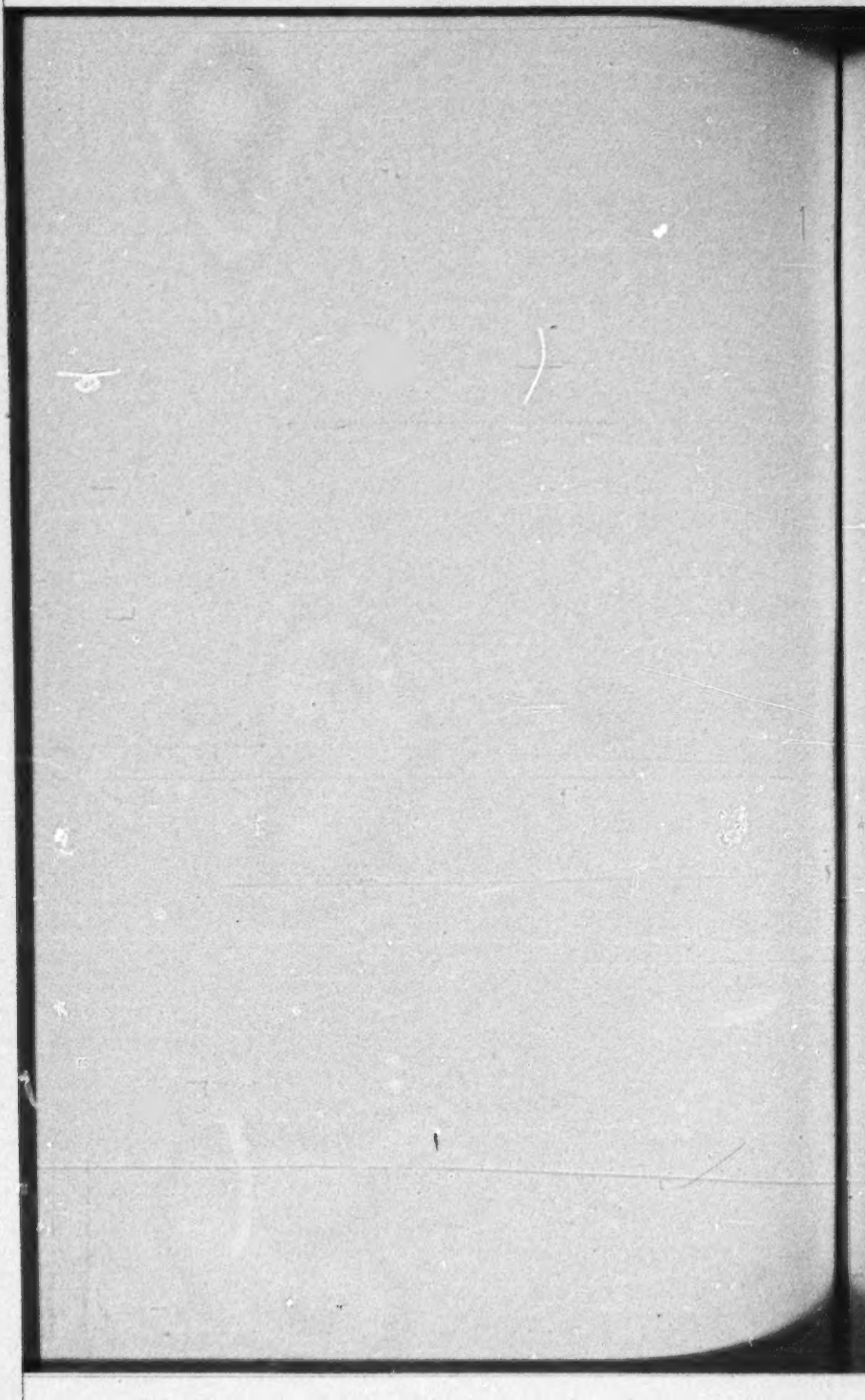
Suite 208,
Beverly Hills, California,
Attorney for Petitioner.

Ruby & Ruby Inc., Law Printers, Los Angeles. Phone MA. 6-6071.



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Petitioner,

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Respondent.

On Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, County of Los Angeles.

BRIEF OF PETITIONER.

Opinions.

The trial court issued no formal opinion. The Appellate Department of the Superior Court issued no formal opinion but affirmed without opinion.

Jurisdiction.

The judgment of the Superior Court of the County of Los Angeles, State of California was entered on August 24, 1965. A timely petition for rehearing filed on August 27, 1965 was denied on August 30, 1965. [Tr. pp. 163-165.]

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3).

Questions Presented.

I.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute a Violation of Due Process.

II.

Does the Taking of a Sample of Blood From a Person Over His Objection That Counsel Has Advised Him Not to Give Such a Sample Constitute a Denial of the Right to Counsel.

III.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute an Unlawful Search and Seizure.

IV.

Does the Introduction Into Evidence of a Person's Blood Sample or His Refusal to Take a Blood Test Constitute a Denial of the Privilege Against Self-Incrimination.

Constitutional Provisions Involved.

The Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution provide in part as follows:

FOURTH AMENDMENT

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ."

FIFTH AMENDMENT

". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty . . . without due process of law . . ."

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

FOURTEENTH AMENDMENT

". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

Statement of Case.

Petitioner was involved in an automobile accident when the car he was allegedly driving struck a tree. He was observed at the scene by a Los Angeles Police officer as Petitioner was being placed in the ambulance. [Tr. p. 68.] Petitioner received treatment at the hospital for various lacerations. He had a fractured ankle and fractured ribs. [Tr. pp. 149-151.] While in the hospital the Los Angeles Police officer asked Petitioner to agree to a blood sample. The Petitioner initially stated he would give a sample. Previous to the taking of the sample the Petitioner told the officer that he objected and would not give such sample since his attorney had advised him not to give such a sample. [Tr. pp. 87-88.]

Petitioner, in pre-trial proceedings filed a written motion to suppress the evidence of the blood tests and all circumstances surrounding it including the refusal to take the test. The written motion asserted that the taking of the blood was a violation of the Fifth and Fourteenth Amendments to the United States Constitution. The motion was denied. [Tr. p. 32.] The same motion was renewed during the trial and denied. [Tr. pp. 90-94.]

At the trial Petitioner's affidavit supporting his motion for suppression was uncontradicted by the People and contained the statement that a further basis for his refusal was "because of my privilege against self-incrimination contained in the California Constitution and the Fifth and Fourteenth Amendments to the Federal Constitution." [Tr. pp. 20, 30.]

The officer directed the doctor to take the blood sample over Petitioner's objection. Although the officer testified he had arrested Petitioner previous to the request for extracting the blood the City Attorney had stipulated to the correctness of Petitioner's affidavit wherein it alleges that the arrest took place after the blood withdrawal. [Tr. pp. 20, 30, pp. 74-75, pp. 87-90.]

The results of the blood test was introduced in evidence and an expert testified it showed the Petitioner was under the influence of intoxicating liquor. [Tr. pp. 127, 129-130.] Of the four witnesses called by the people who saw petitioner at the scene only the two police officers testified he was intoxicated [Tr. pp. 69-70, 116] one witness testified petitioner was not under the influence and the other testified he thought petitioner was in shock. [Tr. pp. 42, 49.]

ARGUMENT.

I.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute a Violation of Due Process.

As stated in Chief Justice Warren's dissent in this Court's decision in *Breithaupt v. Abram*, 352 U.S. 432:

> "In reaching its conclusion that in this case, unlike *Rochin*, there is nothing 'brutal' or 'offensive' the Court has not kept separate the component parts of the problem. Essentially there are two: the character of the invasion of the body and the expression of the victim's will; the latter may be manifested by physical resistance. Of course, one may consent to having his blood extracted or his stomach pumped and thereby waive any due process objection. In that limited sense the expression of the will is significant. But where there is no affirmative consent, I cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest. The Court, however, states that 'the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right.' This implies that a different result might follow if Petitioner had been conscious and had voiced his objection. I reject the distinction.
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> "Since there clearly was no consent to the blood test, it is the nature of the invasion of the body that should be determinative of the due process

question here presented. The Court's opinion suggests that an invasion is 'brutal' or 'offensive' only if the police use force to overcome a suspect's resistance. By its recital of the facts in *Rochin*—references to a 'considerable struggle' and the fact that the stomach pump was 'forcibly used' —the Court find *Rochin* distinguishable from this case. I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights.

"Apart from the irrelevant factor of physical resistance, the techniques used in this case and in *Rochin* are comparable. In each the operation was performed by a doctor in a hospital. In each there was an extraction of body fluids. Neither operation normally causes any lasting ill effects. The Court denominates a blood test as a scientific method for detecting crime and cites the frequency of such tests in our everyday life. The stomach pump too, is a common and accepted way of making tests and relieving distress. But it does not follow from the fact that a technique is a product of science or is in common, consensual use for other purposes that it can be used to extract evidence from a criminal defendant without his consent. Would the taking of spinal fluid from an unconscious person be condoned because such tests are commonly made and might be used as a scientific aid to law enforcement?

"Only personal reaction to the stomach pump and the blood test can distinguish them. To base the restriction which the Due Process Clause imposes on state criminal procedures upon such reac-

tions is to build on shifting sands. *We should, in my opinion, hold that due process means at least that law enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth.*" (Emphasis added.)

This Court now holds that the Fifth Amendment is applicable to the States through the Fourteenth Amendment.

Malloy v. Hogan, 378 U.S. 1, 12 L. Ed. 2d 653, 85 S.Ct. .....

Thus, the argument that the Fifth Amendment doesn't apply to the States, which was one of the arguments asserted by the majority in *Breithaupt*, is no longer a valid support.

Due Process to have a meaning, should unequivocally mean that police may not commit assault and battery on an accused person for the purpose of obtaining evidence to use against him. Why should this Court interpret the Constitution to allow physical evidence obtained as a result of battery (nonconsensual insertion of needle through skin) and theft (nonconsensual taking of personal property—blood) to be used against a defendant when it has held that obtaining oral incriminatory utterances by such means is violative of due process?

Brown v. Mississippi, 297 U.S. 278.

To attempt to draw such a distinction makes a mockery of the Constitution. It seems unreasonable to say that if you place a man on the rack and squeeze an oral

utterance from his lips this is violative of due process, but if you "squeezed" blood out of him, in a medically approved manner, this is not oral and therefore not constituting a confession it is not violative of due process.

Under the present status of the law in California, and in many States, *Breithaupt* is the support for the police to invade person's bodies and extract what evidence they need to help them convict the accused.

People v. Duroncelay, 48 Cal. 2d 766;
State v. Berg, 76 Ariz. 96, 259 P. 2d 261;
State v. Cram, 176 Ore. 577, 160 P. 2d 283.

A decision by this Court is essential to clearly define and limit the claimed right of the police to invade the bodies of citizens and extract from them blood which in no way is contraband. Even the trial judge intimated that a different rule should apply but he felt bound by *Duroncelay supra.* [Tr. pp. 30-31, 94.]

It seems unreasonable to say that only if the accused commits a crime[1] by physically resisting the withdrawal of blood does due process and *Rochin* apply. To follow this reasoning in effect would encourage commission of crimes by an accused in order to protect his constitutional rights. Such reasoning and result would be an anomaly. There is no basis in our society for any reasoning that a citizen must physically fight the police in order to protect his right to due process. By asserting the argument that he must fight the fallacy of the contention becomes obvious.

[1]California Penal Code 148, 242, 243, 834a. These sections provide among other things, that one shall not resist, obstruct, or delay an officer in the discharge of his duties, nor shall one commit a battery on an officer or resist an arrest.

This procedure is also violative of due process since it, in effect, amounts to forcing a person to admit to a crucial part of the People's case. If physical force or other objectionable practices were used to extract an oral or written admission or confession the admission or confession would be inadmissible.

Brown v. Mississippi, 297 U.S. 278;
Ashcroft v. Tennessee, 322 U.S. 143;
Mallory v. United States, 354 U.S. 449.

There is no valid distinction between such judicially condemned practices and the conduct of the police in this case. The result is the same—force is used to extract incriminating evidence from a person.

II.

Does the Taking of a Sample of Blood From a Person Over His Objection That Counsel Has Advised Him Not to Give Such a Sample Constitute a Denial of the Right to Counsel.

A defendant is entitled to an attorney at all stages of the proceedings.

Gideon v. Wainright, 372 U.S. 335 ....;
Escobedo v. Illinois, 378 U.S. 478;
Massiah v. United States, 377 U.S. 201.

When Petitioner advised the police he objected to the blood test because his attorney had advised him not to take it he was certainly exercising his right to counsel. [Tr. pp. 87-88.] How else can a defendant or anyone utilize advice given by counsel except by adhering to the advice given? Here, the conduct of the police in taking Petitioner's blood over his objection and contrary to his counsel's advice, effectively constituted a de-

nial of the right to counsel. This type of conduct by the police if condoned gives the police the right to deny counsel to defendant because the end result is the same —If he doesn't have counsel he takes the test voluntarily—if he has counsel he takes the test involuntarily.

The value of *Escobedo* and *Massiah* are negated if the police can thusly overcome the right to counsel.

III.

Does the Taking of a Sample of Blood From a Person Over His Objection Constitute an Unlawful Search and Seizure.

Petitioner contends that there was an illegal arrest in this matter and that any resultant search was illegal. However, since the trial court held the arrest was legal Petitioner will assume this as true for the purposes of present argument herein. [Tr. pp. 90-94.]

The framers of our Constitution certainly would have been repelled at the thought that someday police officers would claim a right to enter the body of a person, for the purpose of obtaining evidence against him which isn't even contraband, after they have made a lawful arrest. To follow the reasoning that such practice is constitutional, if proper medical means are followed, leads one to the conclusion that exploratory surgery of the abdomen would be proper to prove that a person had narcotics and had swallowed it. This argument and reasoning becomes more frightening when it is realized that the police will be the ones making the decisions. Here, officer Slatterly and officer Smith were the police officers who *ordered* the doctor to extract the blood. [Tr. p. 89.] This was no medical decision but rather a police decision! We should also note that apparently

the doctor was there when petitioner made his objection, but irrespective of this the doctor adhered to the direction of the police. [Tr. pp. 73, 88] This very conduct in this case should be warning enough as to what type of conduct can be expected from the police when no positive limits are set down by this Court.

Certainly logic and reason compels us to conclude that with or without the right to arrest the police do not have the right to puncture the skin of a suspect under claim of right as a reasonable search and seizure. Such a search is not reasonable!

Even assuming a valid arrest and a valid search the state is limited to the proper seizing of contraband or articles used in the perpetration of the crime. Blood does not come within this category.

Boyd v. U.S. 116 U.S. 616, 630;

Gouled v. U.S. 255 U.S. 298.

This court's recent decisions makes Federal standards of search and seizure applicable to the States.

Mapp v. Ohio, 367 U.S. 643;

Ker v. California, 374 U.S. 23.

IV.

Does the Introduction Into Evidence of a Person's Blood Sample or His Refusal to Take a Blood Test Constitute a Denial of the Privilege Against Self-Incrimination.

It seems fallacious to hold, as the California Courts have, that since the taking of blood doesn't amount to testimonial compulsion there can be no violation of the privilege against self-incrimination.

People v. Haeussler, 41 Cal. 2d 252.

Such an argument completely ignores the realities of the situation. Certainly a person is "giving" evidence against himself when blood is being extracted from his veins. What is the difference between forcing a defendant to testify he has consumed sufficient alcoholic beverages to become intoxicated or taking his blood and proving by its content that he has consumed that particular amount of alcoholic beverage? Doesn't the drawing of such a distinction conflict with the underlying rule which holds that oral evidence obtained as a result of an illegal arrest or unlawful search and seizure is excludable as a "fruit" of the official illegality?

Wong Sun v. U.S., 371 U.S. 471.

Certainly it seems that the utilization of blood taken from a defendant over his objection is just as "incriminating" as his statement that he has consumed a specific amount of alcohol. No attempt can be made to make a *valid* distinction between the two processes as regards their constitutional limitations by the privilege against self incrimination.

The court in allowing into evidence the fact of petitioners refusal to take a breathalyzer and blood test further violated petitioners privilege against self incrimination[2] [Tr. p. 96.]

Griffin v. California, 380 U.S. .....

What is the value of the privilege against self incrimination if the assertion of it subjects the individual

[2]In stipulating what part of the lower court's transcript should be reproduced for this brief petitioner failed to have reprinted the courts statement to the jury allowing them to consider the evidence as to the blood sample and the prosecutor's comment to the jury that petitioner refused the breathalyzer test and blood test.

to adverse inferences because of its assertion? If this Court holds that a person has a right to refuse to take a breathalyzer or blood alcohol test then California's rule of allowing evidence of its refusal in evidence is plainly violative of the privilege against self incrimination. California's rule allowing introduction of such evidence is contained in jury instructions prepared and used by the City Attorney of Los Angeles in any driving under the influence case which involves a refusal to take a chemical test. (Appendix A) The word "balloon" is struck out and "breathalyzer" or "blood" is inserted in its place in the appropriate case.

It can thus be seen that such an instruction effectively negates the constitutional right of the person asserting his rights and it amounts to a denial of his rights.

Conclusion.

For the reasons herein stated, Petitioner respectfully urges that *Breithaupt v. Abram,* should be overruled and the judgment of the court below be reversed.

Dated: March 8th, 1966.

Respectfully submitted,

THOMAS M. MCGURRIN,
Attorney for Petitioner.

APPENDIX.

Plaintiff's Proposed Instruction No. .....

YOU ARE INSTRUCTED THAT in a case where a defendant is accused of violating Section 23102 of the Vehicle Code it is permissible to prove that the defendant was offered a balloon test after he or she has been made aware of the nature of the test and its effect. The fact that such test is refused under such circumstances is not sufficient standing alone and by itself to establish the guilt of a defendant but is a fact which, if proven may be considered by you in the light of all other proven facts in deciding the question of guilt or innocence. Whether or not such conduct shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your determination.

Given
Given as Modified
Refused

.....
Judge

People v. McGinnis, 123 Cal. App. 2d Sub. 945

As approved *by People v. Gordon Raymond Starrett* March 20, 1959, CR A 3953

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Statutes

IN THE

Supreme Court of the United States

October Term 1965
No. 658

ARMANDO SCHMERBER,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT.

Reference to Official Reports.

The trial court issued no formal opinion. The Appellate Department of the Superior Court affirmed the judgment without formal opinion.

Jurisdiction.

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, Section 1257(3).

Constitutional and Statutory Provisions Involved in the Case.

The case involves the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; Article I, Section 13 of the California Constitution, and Sections 23101 and 23102 of the California Vehicle Code.

Statement of the Case.

Petitioner was charged in a verified complaint, filed in the Municipal Court of the Los Angeles Judicial District, with having committed, on November 13, 1964, violations of Sections 23102(a) and 12951 of the Vehicle Code of the State of California, misdemeanors. The complaint charged that the petitioner had been convicted previously, on February 23, 1962, of having violated California Vehicle Code Section 23102. That statute reads as follows:

> 23102. (a) It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway. Any person convicted under this section shall be punished upon a first conviction by imprisonment in the county jail for not less than 30 days nor more than six months or by fine of not less than two hundred fifty dollars ($250) nor more than five hundred dollars ($500) or by both such fine and imprisonment and upon a second or any subsequent conviction, within seven years of a prior conviction, by imprisonment in the county jail for not less than five days nor more than one year and by a fine of not less than two hundred fifty dollars ($250) nor more than one thousand dollars ($1,000). A conviction under this section shall be deemed a second conviction if the person has previously been convicted of a violation of Section 23101 of this code.
>
> (b) If any person is convicted of a second or subsequent offense under this section within seven years of a prior conviction and is granted proba-

tion, it must be a condition of probation that such person be confined in jail for at least five days but not more than one year and pay a fine of at least two hundred fifty dollars ($250) but not more than one thousand dollars ($1,000).

Petitioner was duly arraigned, entered a plea of not guilty and requested a jury trial. Prior to trial petitioner made a motion to suppress the evidence of the blood sample. The trial court indicated that it would deny the motion. [Tr. p. 31.] Count II was dismissed before the trial began. The cause proceeded to trial, during which the court overruled an objection to the admissibility of the blood sample. [Tr. p. 94.] The prosecution's case in the Municipal Court of Los Angeles Judicial District was presented as follows:

Lowell Eaker testified that, on November 13, 1964, at approximately 10 P.M., he met the petitioner at the A J Tavern where they played one game of pool and had two beers. [Tr. p. 35.] The men left the tavern and went to the Tarzana Bowling Alley where they each had one drink of whiskey. When the two men left, the petitioner was driving in excess of the speed limit and Eaker asked him to slow down. [Tr. p. 36.] The last thing before the accident which Eaker remembered was seeing a tree coming up and a lawn and sidewalk. [Tr. p. 37.] Eaker was knocked unconscious and woke up at the hospital where he was treated. [Tr. p. 38.]

Bruce E. Davidson testified that, on November 13, 1964, at approximately 11:55 P.M., he heard skidding and then a crash. He went outside and saw a wrecked car with two men in it. [Tr. pp. 46, 48.] The petitioner was observed behind the wheel and Eaker was pinned underneath the right side of the right front seat, down

under the glove compartment. Davidson pulled Eaker out of the car and sent for an ambulance. [Tr. p. 49.]

John T. Schillo, a police officer of the City of Los Angeles, in charge of Property Transfer, West Valley Division, testified that, on November 14, 1964, at approximately 4 P.M., he found a blood sample in the Property drawer. He notified a messenger and signed a transfer slip with the name of the petitioner on it. The blood sample was in an envelope sealed with a wax seal. [Tr. pp. 60-64.]

William H. Ranlett, a police officer of the City of Los Angeles, assigned to Central Property Division, testified that on November 14, 1964, it was his duty to check in evidence and property. The prisoner property transfer record was received in evidence. [Tr. p. 65.]

Edward A. Slattery, a police officer of the City of Los Angeles, testified that, on November 13, 1964, at approximately 12 o'clock midnight, he received a radio call regarding an accident and proceeded to the location. [Tr. p. 66.] Upon arriving at the scene, he observed that Eaker was already in the ambulance and petitioner was being placed in the ambulance. [Tr. p. 102.] The officer observed petitioner's face at this time and noted that his eyes were bloodshot and watery and had a glassy appearance, and an odor of alcohol was on his breath. [Tr. p. 68.]

When Officer Slattery first saw the car the petitioner had been driving, it was on the lawn in front of a house with a tree draped over the back. [Tr. p. 67.] After his investigation and considering the direction in which the tree was knocked over, the direction the car was facing, and the location of the tire marks where the car hit the curb, the officer testified that the car

had been driven on the wrong side of the street. [Tr. p. 86.]

Eaker told Officer Slattery that petitioner was the driver of the vehicle. [Tr. p. 82.] A Mr. Yellin had told the officer that when he approached the vehicle Eaker was down on the floorboard on the right hand side, and petitioner was lying in a position that appeared to be on top of Eaker. [Tr. p. 85.]

At the hospital Officer Slattery observed that petitioner's eyes had a glassy appearance and were watery and bloodshot. [Tr. pp. 69, 73.] His speech was slightly slurred and he was slow in talking. The officer formed the opinion that petitioner was under the influence of an alcoholic beverage. [Tr. p. 69.] Petitioner was arrested at the hospital for a violation of California Vehicle Code Section 23101[1] and was informed that he was under arrest; that he was entitled to the services of an attorney; that he could remain silent, and that anything he told the officer could be used against him. [Tr. p. 69.] Petitioner told the officer he understood his rights. [Tr. p. 73.]

Officer Slattery asked petitioner if he would take a Breathalyzer test, which he refused. [Tr. p. 96.] Petitioner was asked if he had any objection to the taking of a blood sample and he replied that he did not. [Tr. p. 87.] When the doctor was prepared to withdraw the blood, petitioner objected. He said he didn't think he should do it as his attorney had advised him not to. Petitioner stated he would not fight the taking of the blood

[1]Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony . . .

because Slattery had told him that, even if the blood was taken it would be indicated in the report that petitioner had objected and had not used any physical force in his objection. [Tr. p. 88.]

It was stipulated that a blood sample was taken from the veins of the petitioner by a Dr. Brooks under standard medical procedures at the Encino Hospital. [Tr. p. 98.] No one held petitioner at the time the blood was extracted. [Tr. p. 89.] The officer testified that the blood sample was put into a glass vial which was put into an envelope sealed with sealing wax and put into a locked drawer at West Valley Police Station. [Tr. p. 99.]

Petitioner told the officer that he had not been driving the car [Tr. p. 95]; that he had not been in any accident, and that the injuries he had were from a beating he received while he was hitchhiking. [Tr. p. 96.]

Thomas E. Buell, a police officer of the City of Los Angeles, testified that, on November 14, 1964, he investigated the accident. He stated that from the way petitioner walked and acted, he was able to form the opinion that petitioner was well under the influence of an alcoholic beverage. [Tr. p. 116.]

Mrs. Geraldine Lambert, a police chemist for the City of Los Angeles, testified that she made an analysis of the blood sample which showed a blood alcohol reading of .18. [Tr. p. 127.] That in her opinion an individual with this reading would be under the influence of intoxicating liquor. [Tr. p. 130.] She further testified that an individual with a reading of .18 percent blood alcohol would have approximately 13 and one-half ounces of 86-proof alcohol in his body fluids. [Tr. p. 132.] The blood sample was received in evidence. [Tr. p. 142.] This concluded the case for the prosecution.

The only witness for the defense was the petitioner himself. He testified that he was not driving the car just prior to the accident because he was in the back seat. [Tr. p. 148.] Petitioner also denied that he was under the influence of intoxicating liquor on the night of November 13, 1964. [Tr. p. 152.]

A verdict of guilty was returned. [Tr. p. 159.] Petitioner was granted probation on condition he serve the first 30 days of the probationary period in jail and pay a fine of $250.00.

An appeal was taken from the order granting probation to the Appellate Department of the Superior Court for the County of Los Angeles. Briefs were filed, oral argument presented, and the matter submitted. The order granting probation was affirmed [Tr. p. 163], and a subsequent petition for rehearing or certification to the District Court of Appeal was denied. [Tr. pp. 165-166.]

Summary of Argument.

The arrest of petitioner for a violation of Section 23101 of the California Vehicle Code was based on probable cause. Incident to the lawful arrest, the police officers had a right to search for evidence.

Taking a blood sample from petitioner over his objection, without force, in a medically approved manner, did not constitute an unreasonable search or a denial of due process of law.

The blood sample received in evidence is not a violation of the Fifth Amendment privilege against self-incrimination, as the privilege relates to testimonial compulsion and not to real evidence.

Taking the blood sample from petitioner after advising him of his right to counsel was not a denial of the right to counsel.

ARGUMENT.

I.

The Arrest Was Legal.

A peace officer may, without a warrant, arrest a person whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

California Penal Code Section 836.3.

Reasonable or probable cause for a peace officer to arrest a person without a warrant is shown where a man of ordinary care and prudence would be led to believe and conscientiously entertain an honest and strong suspicion that the accused is guilty. (*People v. Cockrell*, 63 A.C. 691, 697, 47 Cal. Rptr. 788.) In determining whether the arresting officer had reasonable cause, the court must look to the facts and circumstances presented to the officer at the time he was required to act. (*Draper v. United States*, 358 U.S. 307, 313, 3 L. Ed. 2d 327, 332.)

Officer Slattery had information from Eaker and Yellin that petitioner was the driver of the car involved in an accident. There was suspicion of an injury, as Eaker had been taken to the hospital in an ambulance. From his investigation the officer determined that petitioner had been driving on the wrong side of the street, an act forbidden by law, and neglecting a duty imposed by law to drive on the correct side of the street.

From these facts, respondent contends that the officer had probable cause to believe a felony had occurred, a violation of California Vehicle Code Section 23101, and thus could arrest the petitioner whether or not a felony had in fact been committed. The arrest was legal.

Petitioner's affidavit [Tr. p. 20] states the blood sample was taken prior to his arrest. While the prosecution did not controvert petitioner's affidavit at the hearing on the motion to suppress [Tr. p. 30], the evidence presented at trial showed the arrest was made before the extraction of the blood. [Tr. pp. 69, 75, 84.] Petitioner's testimony made no reference to the time of his arrest in relation to the taking of the blood sample.

II.

Taking a Blood Sample Was a Reasonable Search Incident to a Lawful Arrest.

As incident to a lawful arrest, police officers may make a reasonable search. (*United States v. Rabinowitz,* 339 U.S. 56, 57, 94 L. Ed. 653, 655; *Ker v. California,* 374 U.S. 24. 34, 10 L. Ed. 2d 726, 738; *People v. Duroncelay,* 48 Cal. 2d 766, 771, 312 P. 2d 690; *People v. Lane,* 240 A.C.A. 700, 705, 49 Cal. Rptr. 712.)

The trial court determined that the taking of the blood sample was a reasonable search [Tr. p. 94] incident to a lawful arrest. [Tr. p. 92.] (*Mapp v. Ohio,* 367 U.S. 643, 653, 6 L. Ed. 2d 1081, 1089.)

The taking of a blood sample in a medically approved manner does not offend "a sense of justice" (*Brown v. Mississippi,* 297 U.S. 278, 80 L. Ed. 682), nor does it constitute brutality, or shock the conscience, or deprive petitioner of due process of law under the rule applied in *Rochin v. California,* 342 U.S. 165, 96 L. Ed. 183. (*Breithaupt v. Abram,* 352 U.S. 432, 435, 1 L. Ed. 2d 448, 450; *People v. Huber,* 232 Cal. App. 2d 663, 672, 43 Cal. Rptr. 65; *People v. Duroncelay, supra; People v. Lane, supra.*)

Petitioner states that *Breithaupt* is support for the police to invade person's bodies. The case of *State v. Cram,* 176 Ore. 577, 160 P. 2d 283, referred to by petitioner and decided twelve years before *Breithaupt,* was cited as authority in *Breithaupt.* (1 L. Ed. 2d 448, 452.) *Cram* was factually the same as *Breithaupt.*

Petitioner has referred to *State v. Berg,* 76 Ariz. 96, 259 P. 2d 261, decided four years before *Breithaupt.* The *Berg* case, involving a use of force to obtain a breath sample, was overruled in *State v. Pina,* 94 Ariz. 243, 383 P. 2d 167, insofar as it justified an unreasonable search.

A search of an individual's rectum in a medically approved manner does not constitute an unreasonable search. (*Blackford v. United States,* 247 F. 2d 745; *Denton v. United States,* 310 F. 2d 129.) Giving an emetic to a suspect to cause him to regurgitate something he has swallowed does not constitute an unreasonable search. (*Barrera v. United States,* 276 F. 2d 654; *Lane v. United States,* 321 F. 2d 573.)

A state may constitutionally require the taking of a blood alcohol test as a prerequisite to the privilege of using the roads. (*Walton v. City of Roanoke,* 204 Va. 678, 133 S.E. 2d 315; *Lee v. State,* 187 Kan. 566, 358 P. 2d 765; *State v. Bock,* 80 Idaho 296, 328 P. 2d 1065; *Prucha v. Dept. of Motor Vehicles,* 172 Neb. 415, 110 N.W. 2d 75.)

The efficacy of a blood test depends upon it being made as soon as possible after the time of the offense. The intoxicating effect of alcohol diminishes with the passage of time. (*In re Martin,* 58 Cal. 2d 509, 512, 374 P. 2d 801.) Alcoholic content in the blood furnishes a scientific method of determining the extent of

the influence of liquor upon a person, and chemical analysis of the blood itself is a scientifically accurate method of ascertaining that content. (*State v. Johnson*, 42 N.J. 146, 199 A. 2d 809, 821.) A blood alcohol test protects one who has the odor of alcohol on his breath but has not been drinking to excess and one whose conduct may create the appearance of intoxication when he is suffering from some physical condition over which he has no control. A blood alcohol test may serve to exonerate as well as convict. (*People v. Bellah*, 237 A.C.A. 127, 134, 46 Cal. Rptr. 598; *Breithaupt, supra.*)

When the blood sample was taken from petitioner, no force was used. The sample was taken pursuant to standard medical practices. Extraction of blood for testing purposes is an experience which millions of Americans submit to daily without hardship or ill-effects. Taking of a blood sample in the light of the imperative public interest involved does not constitute an unreasonable search and is therefore not a denial of due process.

The absence of consent does not render the taking of the blood sample a violation of a constitutional right. The test administered to petitioner would not be considered offensive by even the most delicate. Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of "decency and fairness" that has been woven by common experience from the fabric of acceptable conduct. It is on this bedrock that the concept of due process has been established. The blood test procedure has become routine in our daily lives.

Taking the blood sample without any force pursuant to standard medical procedure was not a return to the "rack and the screw," but rather was a reasonable search incident to a lawful arrest, which was not a denial of due process.

III.

Taking a Blood Sample Does Not Constitute a Violation of the Privilege Against Self-Incrimination.

In *Holt v. United States,* 218 U.S. 243, 252, 54 L. Ed. 1021, 1030, this court held that the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence.

After the petitioner was lawfully placed under arrest, there was no impropriety but it was in accordance with the duty of the officers to make a search for evidence relevant to the commission of the crime. The blood sample obtained constituted real evidence and is therefore outside the scope of the privilege against self-incrimination.

The privilege against self-incrimination had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons in the late Seventeenth Century. What was a rule of evidence in England became a constitutional enactment in the United States. (*Brown v. Walker,* 161 U.S. 591, 596, 40 L. Ed. 819, 821.) The object of the constitutional privilege against self-incrimination is the employment of legal process to extract from an accused's own lips an admission of his guilt, which will thus take the place of other evidence. It is not merely any and every com-

pulsion that is the kernel of the privilege in history and in constitutional definitions, but testimonial compulsion. (*People v. Haeussler*, 41 Cal. 2d 252, 257, 260 P. 2d 8; *People v. Fuller*, 236 Cal. App. 2d 889, 894, 46 Cal. Rptr. 435; *People v. Lane, supra.*)

The privilege relates only to a compulsory oral examination, or the equivalent thereof, of an accused person either before or at trial. The privilege against self-incrimination never had, nor was it intended to have, an application to the removal of real evidence from the person of an accused. (*Blackford v. United States, supra.*) The privilege is limited to testimonial compulsion.

Certain types of examination or inspection are outside the scope of the privilege against self-incrimination because they are non-testimonial in character. Included in these are voice identification (*State v. King*, 44 N.J. 346, 357, 209 A. 2d 110, 116); fingerprinting (*United States v. Kelly*, 55 F. 2d 67, 68; *Gage v. State*, 387 S.W. 2d 679); X-ray photos (*State v. Campbell*, 405 P. 2d 978); photographs (*Williams v. State*, 395 S.W. 2d 834); a police "show-up" (*People v. Lopez*, 60 Cal. 2d 223, 241, 384 P. 2d 16; *People v. Gilbert, supra*, 741); the results of an intoximeter test (*People v. Sykes*, 238 A.C.A. 190, 192, 47 Cal. Rptr. 596; a request to a defendant to put on eyeglasses during a trial (*People v. Tomaszek*, 54 Ill. App. 2d 254, 204 N.E. 2d 30), and a request to a defendant at trial to stand so a victim could identify him. (*State v. Carcerano*, 390 P. 2d 923.)

Removal of heroin inclosed in a rubber sheath from a defendant's rectum by a medical doctor (*Blackford v. United States, supra; Murgia v. United States*, 285 F.

2d 14), or putting a hand on defendant's throat causing him to spit out balloons containing heroin which he attempted to swallow (*People v. Mora*, 238 A.C.A. 1, 4, 47 Cal. Rptr. 338), does not violate the privilege against self-incrimination.

A blood sample taken from an individual is real evidence and does not violate the privilege against self-incrimination as that privilege is limited to testimonial compulsion. (*People v. Lane, supra; State v. Blair*, 45 N.J. 43, 211 A. 2d 196, 198; *Walton v. Roanoke, supra; Commonwealth v. Tanchyn*, 200 Pa. Supp. 148, 188 A. 2d 824; *Duroncelay, supra; Breithaupt, supra.*)

Respondent contends there is no substantial difference between a blood sample, a fingerprint, a photograph, or an actual view of the accused. None of these constitutes testimonial compulsion since they are examples of real evidence and thus do not violate the self-incrimination privilege.

Evidence consisting of a blood sample taken from the petitioner is not obtained by testimonial compulsion. It is not a communication from the petitioner but is real evidence of the ultimate fact in issue—the petitioner's physical condition.

Griffin v. California, 380 U.S. 609, 14 L. Ed. 2d 106, is not in point. That case is limited to the comment on the failure of a defendant to testify at trial. Petitioner did testify at his trial; therefore *Griffin* is not applicable. (*People v. Sykes, supra.*)

A person under lawful arrest does not have any constitutional right under California Constitution, Article I, Section 13, giving a privilege against self-incrimination, to decline a blood alcohol test, properly adminis-

tered, and no federal constitutional right is violated by requiring him to submit to such a test.

People v. Conterno, 170 Cal. App. 2d Supp. 817, 827, 339 P. 2d 968.

Petitioner refused to take a Breathalyzer test. The breath method of determining the amount of alcohol in the blood "has the advantage of prompt and easy administration by non-medically trained personnel and with relatively inexpensive equipment." The Breathalyzer is one of the devices that "are now generally scientifically recognized as sufficiently reliable." (*State v. Johnson, supra.*)

Petitioner did not take the Breathalyzer test. The jury instruction referred to in petitioner's brief was not given at his trial. However, the admission into evidence of a refusal to take a blood alcohol test is not error and does not violate the privilege against self-incrimination. (*Dayton v. Allen,* 200 N.E. 2d 356, 366; *State v. Durrant,* 188 A. 2d 526; *State v. Smith,* 230 S.C. 164, 94 S.E. 2d 886, 890; *State v. Benson,* 230 Iowa 1168, 300 N.W. 275; *Gardner v. Commonwealth,* 195 Va. 845, 81 S.E. 2d 614; *Conterno, supra; People v. Zavala,* 239 A.C.A. 810, 818, 49 Cal. Rptr. 129.) An accused who testifies, subjects to comment and inference his omission to explain circumstances and events already in evidence. (*Caminetti v. United States,* 242 U.S. 470, 61 L. Ed. 442; *Johnson v. United States,* 318 U.S. 189, 87 L. Ed. 704.)

The introduction of the blood sample into evidence and testimony regarding the refusal to take the blood alcohol test, do not violate the privilege against self-incrimination.

IV.

Taking the Blood Sample Does Not Constitute a Denial of Right to Counsel.

Police officers have the right to have a blood sample extracted in a medically approved manner. (*Breithaupt, supra.*) If the police have this right, then the taking of the blood in a medically approved manner is not a denial of the right to counsel.

In a recent case involving handwriting examplars, *People v. Graves*, 64 A.C. 216, 49 Cal. Rptr. 386, the California Supreme Court pointed out that not every aid that a defendant or suspect is required to give the prosecution violates the privilege against self-incrimination or a denial of the right to counsel. The court stated on page 218, that

> "The right to counsel during police interrogation established in *Escobedo v. Illinois* [378 U.S. 478, 12 L. ed. 2d 977], is designed to prevent the rise of coercive practices to extort confessions or other incriminating statements. It does not protect a defendant from revealing evidence against himself in other ways. It applies only when 'the police carry out a process of interrogation that lends itself to eliciting incriminating statements.' . . . Accordingly, we find no support in *Escobedo* for invoking the right to counsel *to block scientific crime investigation.* Reliance on handwriting examplars for expert analysis is not a substitute for thorough scientific investigation of crime but an excellent example of such investigation. To preclude the police from asking for such exemplars would foster reliance instead on the very inquisitorial methods of law enforcement that *Escobedo* deems suspect." (Emphasis added.)

The same reasons given by the court in affirming the judgment of conviction wherein exemplars were taken and used applies to the case at bar for the taking of blood for scientific investigation to determine the condition of a driver. The rule of *Escobedo* and *People v. Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169, is applicable to incriminating statements of an accused, and not to real evidence obtained in a search incident to a lawful arrest. (See: *People v. Lane, supra.*)

Conclusion.

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 658.—October Term, 1965.

Armando Schmerber, Petitioner, v. State of California.	On Writ of Certiorari to the Appellate Department of Superior Court of California, County of Los Angeles.

[June 20, 1966.]

Mr. Justice Brennan delivered the opinion of the Court.

Petitioner was convicted in Los Angeles Municipal Court of the criminal offense of driving an automobile while under the influence of intoxicating liquor.[1] He had been arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile that he had apparently been driving.[2] At the direction of a police officer, a blood sample was then withdrawn from petitioner's body by a physician at the hospital. The chemical analysis of this sample revealed a percent by weight of alcohol in his blood at the time of the offense which indicated intoxication, and the report of this analysis was admitted in evidence at the trial. Petitioner objected to receipt of this evidence of the analysis on the ground that the blood had been withdrawn despite his refusal, on the advice of his counsel, to consent to the

[1] California Vehicle Code § 23102 (a) provides, in pertinent part, "It is unlawful for any person who is under the influence of intoxicating liquor . . . to drive any vehicle upon any highway . . . ." The offense is a misdemeanor.

[2] Petitioner and a companion had been drinking at a tavern and bowling alley. There was evidence showing that petitioner was driving from the bowling alley about midnight November 12, 1964, when the car skidded, crossed the road and struck a tree. Both petitioner and his companion were injured and taken to a hospital for treatment.

test. He contended that in that circumstance the withdrawal of the blood and the admission of the analysis in evidence denied him due process of law under the Fourteenth Amendment, as well as specific guarantees of the Bill of Rights secured against the States by that Amendment: his privilege against self-incrimination under the Fifth Amendment; his right to counsel under the Sixth Amendment; and his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. The Appellate Department of the California Superior Court rejected these contentions and affirmed the conviction.[2] In view of constitutional decisions since we last considered these issues in *Breithaupt* v. *Abram*, 352 U. S. 432—see *Escobedo* v. *Illinois*, 378 U. S. 478; *Malloy* v. *Hogan*, 378 U. S. 1, and *Mapp* v. *Ohio*, 367 U. S. 643—we granted certiorari. 382 U. S. 971. We affirm.

I.

The Due Process Clause Claim.

Breithaupt was also a case in which police officers caused blood to be withdrawn from the driver of an automobile involved in an accident, and in which there was ample justification for the officer's conclusion that the driver was under the influence of alcohol. There, as here, the extraction was made by a physician in a simple, medically acceptable manner in a hospital environment. There, however, the driver was unconscious at the time the blood was withdrawn and hence had no opportunity to object to the procedure. We affirmed the conviction there resulting from the use of the test in evidence, holding that under such circumstances the withdrawal did not offend "that 'sense of justice' of which we spoke in *Rochin* v. *California*, 342 U. S. 165." 352 U. S., at 435. *Breit-*

[2] This was the judgment of the highest court of the State in this proceeding since certification to the California District Court of Appeals was denied. See *Edwards* v. *California*, 314 U. S. 160.

haupt thus requires the rejection of petitioner's due process argument, and nothing in the circumstances of this case [4] or in supervening events persuades us that this aspect of *Breithaupt* should be overruled.

II.

The Privilege Against Self-Incrimination Claim.

Breithaupt summarily rejected an argument that the withdrawal of blood and the admission of the analysis report involved in that state case violated the Fifth Amendment privilege of any person not to "be compelled in any criminal case to be a witness against himself," citing *Twining* v. *New Jersey*, 211 U. S. 78. But that case, holding that the protections of the Fourteenth Amendment do not embrace this Fifth Amendment privilege, has been succeeded by *Malloy* v. *Hogan*, 378 U. S. 1, 8. We there held that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative

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[4] We "cannot see that it should make any difference whether one states unequivocably that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest." *Breithaupt* v. *Abram*, 352 U. S., at 441 (Warren, C. J., dissenting). It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force. Compare the discussion at Part IV *infra*.

nature,[5] and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

It could not be denied that in requiring petitioner to submit to the withdrawal and chemical analysis of his blood the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purposes of the privilege. The critical question, then, is whether petitioner was thus compelled "to be a witness against himself."[6]

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[5] A dissent suggests that the report of the blood test was "testimonial" or "communicative," because the test was performed in order to obtain the testimony of others, communicating to the jury facts about petitioner's condition. Of course, all evidence received in court is "testimonial" or "communicative" if these words are thus used. But the Fifth Amendment relates only to acts on the part of the person to whom the privilege applies, and we use these words subject to the same limitations. A nod or head-shake is as much a "testimonial" or "communicative" act in this sense as are spoken words. But the terms as we use them do not apply to evidence of acts non-communicative in nature as to the person asserting the privilege, even though, as here, such acts are compelled to obtain the testimony of others.

[6] Many state constitutions, including those of most of the original Colonies, phrase the privilege in terms of compelling a person to give "evidence" against himself. But our decision cannot turn on the Fifth Amendment's use of the word "witness." "[A]s the manifest purpose of the constitutional provisions, both of the States and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation . . . ." *Counselman* v. *Hitchcock*, 142 U. S. 547, 584–585. 8 Wigmore, Evidence § 2252 (McNaughton rev. 1961).

If the scope of the privilege coincided with the complex of values it helps to protect, we might be obliged to conclude that the privilege was violated. In *Miranda* v. *Arizona*, *ante*, p. 22, the Court said of the interests protected by the privilege: "All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state—individual balance,' to require the government 'to shoulder the entire load' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." The withdrawal of blood necessarily involves puncturing the skin for extraction, and the percent by weight of alcohol in that blood, as established by chemical analysis, is evidence of criminal guilt. Compelled submission fails on one view to respect the "inviolability of the human personality." Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused "by its own independent labors."

As the passage in *Miranda* implicitly recognizes, however, the privilege has never been given the full scope which the values it helps to protect suggest. History and a long line of authorities in lower courts have consistently limited its protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused through "the cruel, simple expedient of compelling it from his own mouth . . . . In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'"

Ibid. The leading case in this Court is *Holt* v. *United States*, 218 U. S. 245. There the question was whether evidence was admissible that the accused, prior to trial and over his protest, put on a blouse that fitted him. It was contended that compelling the accused to submit to the demand that he model the blouse violated the privilege. Mr. Justice Holmes, speaking for the Court, rejected the argument as "based upon an extravagant extension of the Fifth Amendment," and went on to say: "[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof." 218 U. S., at 252–253.[7]

It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd* v. *United States*, 116 U. S. 616. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identi-

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[7] Compare Wigmore's view, "that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process *to extract from the person's own lips* an admission of guilt, which would thus take the place of other evidence." 8 Wigmore, Evidence § 2263 (McNaughton rev. 1961). California adopted the Wigmore formulation in *People* v. *Trujillo*, 32 Cal. 2d 105, 194 P. 2d 681 (1948); with specific regard to blood tests, see *People* v. *Haeussler*, 41 Cal. 2d 252, 260 P. 2d 8 (1953); *People* v. *Duroncelay*, 48 Cal. 2d 766, 312 P. 2d 690 (1957). Our holding today, however, is not to be understood as adopting the Wigmore formulation.

fication, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.[8] The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege "is as broad as the mischief against which it seeks to guard," *Counselman* v. *Hitchcock*, 142 U. S. 547, 562.

In the present case, however, no such problem of application is presented. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test,

[8] The cases are collected in 8 Wigmore, Evidence § 2265 (McNaughton rev. 1961). See also *United States* v. *Chibbaro*, — F. 2d — (C. A. 2d Cir. 1966); *People* v. *Graves*, — Cal. 2d —; 49 Cal. Rptr. 386, 388 (1966); Weintraub, Voice Identification, Writing Exemplars, and the Privilege Against Self-Incrimination, 10 Vand. L. Rev. 485 (1957).

which depend on chemical analysis and on that alone.[9] Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.

III.

The Right to Counsel Claim.

This conclusion also answers petitioner's claim that in compelling him to submit to the test in face of the fact that his objection was made on the advice of counsel,

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[9] This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forego the advantage of any *testimonial* products of administering the test—products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the "search," and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case. See text at n. 13 *infra*.

Petitioner has raised a similar issue in this case, in connection with a police request that he submit to a "breathalyzer" test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under *Griffin* v. *California*, 380 U. S. 609. We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances, see *Miranda* v. *Arizona*, *ante*, at p. 30, n. 37. Since trial here was conducted after our decision in *Malloy* v. *Hogan*, *supra*, making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements.

he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate. No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented. The limited claim thus made must be rejected.

IV.

The Search and Seizure Claim.

In *Breithaupt*, as here, it was also contended that the chemical analysis should be excluded from evidence as the product of an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments. The Court did not decide whether the extraction of blood in that case was unlawful, but rejected the claim on the basis of *Wolf* v. *Colorado*, 338 U. S. 25. That case had held that the Constitution did not require, in state prosecutions for state crimes, the exclusion of evidence obtained in violation of the Fourth Amendment's provisions. We have since overruled *Wolf* in that respect, holding in *Mapp* v. *Ohio* that the exclusionary rule adopted for federal prosecutions in *Weeks* v. *United States*, 232 U. S. 383, must also be applied in criminal prosecutions in state courts. The question is squarely presented therefore, whether the chemical analysis introduced in evidence in this case should have been excluded as the product of an unconstitutional search and seizure.

The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. In *Wolf* we recognized "[t]he security of one's privacy against arbitrary intru-

sion by the police" as being "at the core of the Fourth Amendment" and "basic to a free society." 338 U. S., at 27. We reaffirmed that broad view of the Amendment's purpose in applying the federal exclusionary rule to the States in *Mapp*.

The values protected by the Fourth Amendment thus substantially overlap those the Fifth Amendment helps to protect. History and precedent have required that we today reject the claim that the Self-Incrimination Clause of the Fifth Amendment requires the human body in all circumstances to be held inviolate against state expeditions seeking evidence of crime. But if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment. That Amendment expressly provides that "[t]he right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." (Emphasis added.) It could not reasonably be argued, and indeed respondents do not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of "persons," and depend antecedently upon seizures of "persons," within the meaning of that Amendment.

Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—"houses, papers, and effects"—we write on a clean slate. Limitations on the kinds of property which may be seized under warrant,[10]

[10] See, *e. g.*, *Gouled* v. *United States*, 255 U. S. 298; *Boyd* v. *United States*, 116 U. S. 616; contra *People* v. *Thayer*, 63 Cal. 2d 635, 408 P. 2d 108 (1965); *State* v. *Bisaccia*, 45 N. J. 504, 213 A. 2d 185 (1965); Note, Evidentiary Searches: The Rule and the Reason, 54 Geo. L. J. 593 (1936).

as distinct from the procedures for search and the permissible scope of search,[11] are not instructive in this context. We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol content, the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.

In this case, as will often be true when charges of driving under the influence of alcohol are pressed, these questions arise in the context of an arrest made by an officer without a warrant. Here, there was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor.[12] The police officer who arrived at the scene shortly after the accident smelled liquor on petitioner's breath, and testified that petitioner's

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[11] See, *e. g.*, *Silverman* v. *United States*, 365 U. S. 505; *Abel* v. *United States*, 362 U. S. 217, 235; *United States* v. *Rabinowitz*, 339 U. S. 56.

[12] California law authorizes a peace officer to arrest "without a warrant . . . whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed." Cal. Penal Code § 836.3. Although petitioner was ultimately prosecuted for a misdemeanor, he was subject to prosecution for the felony since a companion in his car was injured in the accident, which apparently was the result of traffic law violations. Cal. Vehicle Code § 23101. California's test of probable cause follows the federal standard. *People* v. *Cockrell*, 63 Cal. 2d 659, 408 P. 2d 116 (1965).

eyes were "bloodshot, watery, sort of glassy appearance." The officer saw petitioner again at the hospital, within two hours of the accident. There he noticed similar symptoms of drunkenness. He thereupon informed petitioner "that he was under arrest and that he was entitled to the services of an attorney, and that he could remain silent and that anything that he told me would be used against him in evidence."

While early cases suggest that there is an unrestricted "right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime," *Weeks* v. *United States*, 232 U. S. 383, 392; *People* v. *Chiagles*, 237 N. Y. 193, 142 N. E. 583 (1923) (Cardozo, J.), the mere fact of a lawful arrest does not end our inquiry. The suggestion of these cases apparently rests on two factors—first, there may be more immediate danger of concealed weapons or of destruction of evidence under the direct control of the accused, *United States* v. *Rabinowitz*, 339 U. S. 56, 72–73 (Frankfurter, J., dissenting); second, once a search of the arrested person for weapons is permitted, it would be both impractical and unnecessary to enforcement of the Fourth Amendment's purpose to attempt to confine the search to those objects alone. *People* v. *Chiagles*, 237 N. Y., at 197–198, 142 N. E., at 584. Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that the inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U. S. 10, 13–14; see also *Aguilar* v. *Texas,* 378 U. S. 108, 110–111. The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence," *Preston* v. *United States,* 376 U. S. 364, 367. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

Similarly, we are satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable

one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. See *Breithaupt* v. *Abram*, 352 U. S., at 436, n. 3. Such tests are a commonplace in these days of periodic physical examinations [13] and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "breathalyzer" test petitioner refused, see n. 9, *supra*. We need not decide whether such wishes would have to be respected.[14]

Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable

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[13] "The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have gone through the same, though a longer, routine in becoming blood donors." *Breithaupt* v. *Abram*, 352 U. S., at 436.

[14] See Karst, Legislative Facts in Constitutional Litigation, 1960 Sup. Ct. Rev. 75, 82–83.

searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 658.—October Term, 1965.

Armando Schmerber, Petitioner, *v.* State of California.	On Writ of Certiorari to the Appellate Department of Superior Court of California, County of Los Angeles.

[June 20, 1966.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, concurring.

In joining the Court's opinion I desire to add the following comment. While agreeing with the Court that the taking of this blood test involved no testimonial compulsion, I would go further and hold that apart from this consideration the case in no way implicates the Fifth Amendment. Cf. my dissenting opinion and that of Mr. Justice White in *Miranda* v. *Arizona*, — U. S. —.

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[June 20, 1966.]

Mr. Chief Justice Warren, dissenting.

While there are other important constitutional issues in this case, I believe it is sufficient for me to reiterate my dissenting opinion in *Breithaupt* v. *Abram*, 352 U. S. 432, 440, as the basis on which to reverse this conviction.

SUPREME COURT OF THE UNITED STATES

No. 658.—October Term, 1965.

Armando Schmerber, Petitioner, v. State of California.	On Writ of Certiorari to the Appellate Department of Superior Court of California, County of Los Angeles.

[June 20, 1966.]

Mr. Justice Black with whom Mr. Justice Douglas joins, dissenting.

I would reverse petitioner's conviction. I agree with the Court that the Fourteenth Amendment made applicable to the States the Fifth Amendment's provision that "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." But I disagree with the Court's holding that California did not violate petitioner's constitutional right against self-incrimination when it compelled him, against his will, to allow a doctor to puncture his blood vessels in order to extract a sample of blood and analyze it for alcoholic content, and then used that analysis as evidence to convict petitioner of a crime.

The Court admits that "the State compelled [petitioner] to submit to an attempt to discover evidence [in his blood] that might be [and was] used to prosecute him for a criminal offense." To reach the conclusion that compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself strikes me as quite an extraordinary feat. The Court, however, overcomes what had seemed to me to be an insuperable obstacle to its conclusion by holding that

". . . the privilege protects an accused only from being compelled to testify against himself, or other-

wise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends." (Footnote omitted.)

I cannot agree that this distinction and reasoning of the Court justify denying petitioner his Bill of Rights' guarantee that he must not be compelled to be a witness against himself.

In the first place it seems to me that the compulsory extraction of petitioner's blood for analysis so that the person who analyzed it could give evidence to convict him had both a "testimonial" and a "communicative nature." The sole purpose of this project which proved to be successful was to obtain "testimony" from some person to prove that petitioner had alcohol in his blood at the time he was arrested. And the purpose of the project was certainly "communicative" in that the analysis of the blood was to supply information to enable a witness to communicate to the court and jury that petitioner was more or less drunk.

I think it unfortunate that the Court rests so heavily for its very restrictive reading of the Fifth Amendment's privilege against self-incrimination on the words "testimonial" and "communicative." These words are not models of clarity and precision as the Court's rather labored explication shows. Nor can the Court, so far as I know, find precedence in the former opinions of this Court for using these particular words to limit the scope of the Fifth Amendment's protection. There is a scholarly precedent, however, in the late Professor Wigmore's learned treatise on evidence. He used "testimonial" which, according to the latest edition of his treatise revised by McNaughton, means "communicative" (8 Wigmore, Evidence § 2263 (McNaughton rev. 1961), p. 378), as a key word in his vigorous and extensive campaign

designed to keep the privilege against self-incrimination "within limits the strictest possible." 8 Wigmore, Evidence § 2251 (3d ed. 1940), p. 318. Though my admiration for Professor Wigmore's scholarship is great, I regret to see the word he used to narrow the Fifth Amendment's protection play such a major part in any of this Court's opinions.

I am happy that the Court itself refuses to follow Professor Wigmore's implication that the Fifth Amendment goes no further than to bar the use of forced self-incriminating statements coming from a "person's own lips." It concedes, as it must so long as *Boyd* v. *United States*, 116 U. S. 616, stands, that the Fifth Amendment bars a State from compelling a person to produce papers he has that might tend to incriminate him. It is a strange hierarchy of values that allows the State to extract a human being's blood to convict him of a crime because of the blood's content but proscribes compelled production of his lifeless papers. Certainly there could be few papers that would have any more "testimonial" value to convict a man of drunken driving than would an analysis of the alcoholic content of a human being's blood introduced in evidence at a trial for driving while under the influence of alcohol. In such a situation blood, of course, is not oral testimony given by an accused but it can certainly "communicate" to a court and jury the fact of guilt.

The Court itself, at page —, expresses its own doubts, if not fears, of its own shadowy distinction between compelling "physical evidence" like blood which it holds does not amount to compelled self-incrimination, and "eliciting responses that are essentially testimonial." And in explanation of its fears the Court goes on to warn that

> "To compel a person to submit to testing [by lie detectors for example] in which an effort will be

made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard.' *Counselman* v. *Hitchcock*, 142 U. S. 547, 562."

A basic error in the Court's holding and opinion is its failure to give the Fifth Amendment's protection against compulsory self-incrimination the broad and liberal construction that *Counselman* and other opinions of this Court have declared it ought to have.

The liberal construction given the Bill of Rights' guarantee in *Boyd* v. *United States*, *supra*, which Professor Wigmore criticized severely, see 8 Wigmore, Evidence, § 2264 (3d ed. 1940), pp. 366–373, makes that one among the greatest constitutional decisions of this Court. In that case, at pp. 634–635, all the members of the Court decided that civil suits for penalties and forfeitures incurred for commission of offenses against the land,

". . . are within the reason of criminal proceedings for all the purposes of . . . that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; . . . within the meaning of the Fifth Amendment to the Constitution . . . ."*

Obviously the Court's interpretation was not completely supported by the literal language of the Fifth Amendment. Recognizing this the Court announced a rule of constitutional interpretation that has been generally

*A majority of the Court applied the same constitutional interpretation to the search and seizure provisions of the Fourth Amendment over the dissent of Mr. Justice Miller, concurred in by Chief Justice Waite.

followed ever since, particularly in judicial construction of Bill of Rights guarantees:

> "A close and literal construction [of constitutional provisions for the security of persons and property] deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd* v. *United States, supra,* at p. 635.

The Court went on to say, at page 637, that to require "an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself." The Court today departs from the teachings of *Boyd.* Petitioner Schmerber has undoubtedly been compelled to give his blood "to furnish evidence against himself," yet the Court holds that this is not forbidden by the Fifth Amendment. With all deference I must say that the Court here gives the Bill of Rights' safeguard against compulsory self-incrimination a construction that would generally be considered too narrow and technical even in the interpretation of an ordinary commercial contract.

The Court apparently, for a reason I cannot understand, finds some comfort for its narrow construction of the Fifth Amendment in this Court's decision in *Miranda.* v. *Arizona, ante,* p. ——. I find nothing whatever in the majority opinion in that case which either directly or indirectly supports the holding in this case. In fact I think the interpretive constitutional philosophy used in *Miranda,* unlike that used in this case, gives the Fifth Amendment's prohibition against compelled self-

incrimination a broad and liberal construction in line with the wholesome admonitions in the *Boyd* case. The closing sentence in the Fifth Amendment section of the Court's opinion in the present case is enough by itself, I think, to expose the unsoundness of what the Court here holds. That sentence reads:

> "Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissable on privilege grounds."

How can it reasonably be doubted that the blood test evidence was not in all respects the actual equivalent of "testimony" taken from petitioner when the result of the test was offered as testimony, was considered by the jury as testimony, and the jury's verdict of guilt rests in part on that testimony? The refined, subtle reasoning and balancing process used here to narrow the scope of the Bill of Rights' safeguard against self-incrimination provides a handy instrument for further narrowing of that constitutional protection, as well as others, in the future. Believing with the Framers that these constitutional safeguards broadly construed by independent tribunals of justice provide our best hope for keeping our people free from governmental oppression, I deeply regret the Court's holding. For the foregoing reasons as well as those set out in concurring opinions of BLACK and DOUGLAS, JJ., in *Rochin* v. *California*, 342 U. S. 165, 174, 177, and my concurring opinion in *Mapp* v. *Ohio*, 367 U. S. 643, 661, and the dissenting opinions in *Breithaupt* v. *Abram*, 352 U. S. 432, 440, 442, I dissent from the Court's holding and opinion in this case.

SUPREME COURT OF THE UNITED STATES

No. 658.—October Term, 1965.

Armando Schmerber, Petitioner, *v.* State of California.	On Writ of Certiorari to the Appellate Department of Superior Court of California, County of Los Angeles.

[June 20, 1966.]

Mr. Justice Douglas, dissenting.

I adhere to the views of The Chief Justice in his dissent in *Breithaupt* v. *Abram*, 352 U. S. 432, 440, and to the views I stated in my dissent in that case (*id.*, 442) and add only a word.

We are dealing with the right of privacy which, since the *Breithaupt* case, we have held to be within the penumbra of some specific guarantees of the Bill of Rights. *Griswold* v. *Connecticut*, 381 U. S. 479. Thus, the Fifth Amendment marks "a zone of privacy" which the Government may not force a person to surrender. *Id.*, 484. Likewise the Fourth Amendment recognizes that right when it guarantees the right of the people to be secure "in their persons." *Ibid.* No clearer invasion of this right of privacy can be imagined than forcible blood-letting of the kind involved here.

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[June 20, 1966.]

Mr. Justice Fortas, dissenting.

I would reverse. In my view, petitioner's privilege against self-incrimination applies. I would add that, under the Due Process Clause, the State, in its role as prosecutor, has no right to extract blood from an accused or anyone else, over his protest. As prosecutor, the State has no right to commit any kind of violence upon the person, or to utilize the results of such a tort, and the extraction of blood, over protest, is an act of violence. Cf. Chief Justice Warren's dissenting opinion in *Breithaupt* v. *Abram*, 352 U. S. 432, 440.